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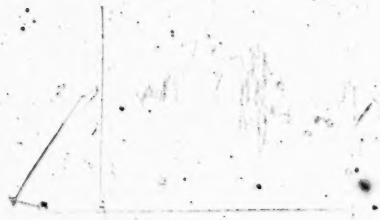

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

BETHLEHEM STEEL CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on June 19, 1963.

OPINIONS BELOW

The memorandum order of the district court (Appendix A, *infra*, p. 44) dismissing the government's claim is not reported. The opinion of the court of appeals (App. A, *infra*, pp. 17–43) is reported at 319 F. 2d 512.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1963. By order of the Chief Justice, dated September 13, 1963, the time for filing a petition for a writ of certiorari was extended to and including

October 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the government has been required to remove a vessel negligently grounded in violation of the Rivers and Harbors Act, may the United States, under that Act, recover the expense of removal from the negligent parties (the vessel's owner and charterer) who failed to fulfill their statutory duty to remove the vessel.

2. Whether, in any event, the United States, by reason of its control of the nation's navigable waters, has a nonstatutory, commonlaw right to reimbursement from the owner and charterer of a negligently-grounded vessel for the expense of removing the vessel as an obstruction to navigation.[1]

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Rivers and Harbors Act of March 3, 1899 (33 U.S.C. 403, 409, 411, 414 and 415), a relevant regulation promulgated thereunder, and the pertinent provisions of the Limitation of Vessel Owner's Liability Act (46 U.S.C. 183(a) and 186) are set forth in Appendix B, *infra*, pp. 45–50.

STATEMENT

This case originated in a petition brought in admiralty pursuant to the Limitation of Vessel Owner's

[1] Whether a negligent shipowner or a negligent charterer has an unqualified right to abandon his vessel in a navigation channel and thereby absolve himself of all liability for the cost of removal is a question subsidiary to the two questions set forth in the text.

Liability Act, 46 U.S.C. 183 *et seq.*, by respondents Bethlehem Steel Corporation and Calmar Steamship Corporation, the owner and bareboat charterer, respectively, of the SS TEXMAR, for exoneration from or limitation of their liability arising out of the loss of that vessel.

On December 30, 1960, the TEXMAR, en route from Aberdeen, Washington, with a cargo of pulp and lumber, grounded on a shoal adjacent to a navigation channel in Grays Harbor, Washington (R. 23–24).[2] Efforts of the crew to free the Liberty-type vessel were unsuccessful and, on December 31, 1960, the TEXMAR fractured and became a constructive loss (R. 7–8). On January 3, 1961, respondents sent a telegram to the United States Army Corps of Engineers purporting to abandon the vessel to the United States, but reserving all rights in the cargo (R. 27).

Immediately upon receipt of the telegram, the Army Corps of Engineers dispatched personnel to the scene to determine whether the TEXMAR represented a pollution or navigation menace (R. 30, 47). When an oil spill was discovered by the Engineers, their dredge PACIFIC was summoned to remove the vessel's fuel oil. During these operations, Calmar proceeded to remove the vessel's cargo (R. 47–48).

On January 13, 1961, the United States sent a telegram to respondents, notifying them that the TEXMAR was an obstruction to navigation in violation of Sections 19 and 20 of the Rivers and Harbors Act, 33 U.S.C. 414, 415, and that, for the safety of naviga-

[2] "R." references refer to the printed record in the court of appeals.

tion, wildlife and other interests, the United States would take action to remove the vessel (R. 28). The telegram also notified the respondents that their asserted right to abandon was denied and that the expenses of removal would be charged to them (R. 28). On January 19, 1961, the United States sent a second telegram to respondents notifying them that all cargo, including that which had been removed, had been for the account of the government and directed them to cease further cargo salvage (R. 29). Calmar then ceased salvage operations.

Thereafter, the United States continued to remove the vessel's fuel oil and eventually removed the derelict vessel itself. The cost of removing the fuel oil exceeded $116,000 (R. 30) and the cost of removing the vessel exceeded $220,000, after deducting the salvage value of the TEXMAR, her oil and the remaining cargo (R. 30–31).

On March 24, 1961, Bethlehem and Calmar filed a petition for exoneration from or limitation of liability (R. 3). In its answer to that petition, the United States asserted that both respondents were negligent and contested their right to relief under the Limitation of Liability Act (R. 15). At the same time, the United States filed a claim for the full cost (less salvage) of removing the TEXMAR and her fuel oil, asserting that the negligence of respondents constituted a violation of the Rivers and Harbors Act, 33 U.S.C. 403, *et seq.* (R. 22). The government based its claim to recover such costs upon that Act and, in the alternative, upon the nonstatutory, common-law right of the United States to recover

the cost of removing an obstruction to navigation which was created by the parties' negligence.

Bethlehem and Calmar moved for dismissal of the claim on the sole ground that it failed to state a cause of action (R. 33), and the district court granted the motion (App. A, *infra*, p. 44).

The court of appeals affirmed by a divided vote. The principal opinion for the majority (by Judge Madden) acknowledged that the relevant statutes were difficult to interpret, but held that all vessel owners have a traditional right under the general maritime law to abandon their vessels with impunity; that Congress recognized this right in the Rivers and Harbors Act; and that the United States has no interest in navigable waters sufficient to sustain a common-law right of recovery. Judge Duniway, concurring, concluded that the Rivers and Harbors Act indicated that the government's rights were limited to the vessel itself.

Judge Browning dissented on the ground that the decision in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, controlled this case.

He stated in pertinent part (App. A, *infra*, pp. 37–38):

"Appellees' alleged conduct in negligently sinking a ship in a navigable channel concededly violated 33 U.S.C. § 409. Section 409, like Section 403, reflects the interest of the United States in the unobstructed navigability of its waters. *Republic Steel* holds that to protect this interest an injunctive remedy must be implied against those who create unauthorized obstructions in violation of Section 403; therefore a like remedy is to be implied against those who voluntarily or carelessly sink vessels in navigable channels in violation of Section 409. Since the United States may by mandatory injunction impose the burden of removal upon one who sinks a ship in violation of Section 409, the government should not be denied restitution

[illegible]

REASONS FOR GRANTING THE WRIT

As the derelict TEXMAR stood fast on a shoal in Grays Harbor, the vessel was an obstruction to navigation and its removal was imperative. Pursuant to the authority conferred upon him by the Rivers and Harbors Act, the Secretary of the Army removed the vessel at a cost in excess of $336,000 (after deducting the salvage value of the vessel and fuel oil). Respondents do not deny that their negligence caused the obstruction and that they violated Section 15 of the Rivers and Harbors Act, 33 U.S.C. 409. However, they argue (and the majority of the court below agreed) that the United States has no right to recover from them the cost of removing the vessel. This interpretation of the Rivers and Harbors Act is, we submit, contrary to the purposes of the Act, the decision of this Court in *United States* v. *Republic Steel Corp.*, 362 U.S. 482, and the long-standing administrative construction of the statute. Moreover, apart from the specific provisions of the Act, the court of appeals erred in interpreting *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, to mean that the government has no common law right to reimbursement. For these reasons, and because of the general importance of the questions, which are recurrent, review by this Court is warranted.

1. As this Court recognized in *Republic Steel*, the Rivers and Harbors Act, 26 Stat. 426, 30 Stat. 1151, 33 U.S.C. 403 *et seq.*, represents a "great design" for the protection of navigable waters from obstructions.

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if it is compelled to assume the costs of removal by the refusal of the wrongdoer to discharge his duty. See Restatement, Restitution, § 115 (1937)."

Section 10 of that Act, 33 U.S.C. 403 (App. B, *infra*, p. 45), provides in part—

> That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; * * *.

Section 15, 33 U.S.C. 409 (App. B, *infra*, pp. 45–46), provides:

> It shall not be lawful * * * to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels * * *. And whenever a vessel * * * is wrecked and sunk in a navigable channel, accidentally or otherwise, * * * it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States * * *.[4]

In *Republic Steel* the United States brought an action under the Rivers and Harbors Act to enjoin three manufacturers from dumping industrial wastes into a navigable river and to compel them to remove existing deposits. The government contended that the companies were causing an "obstruction" to navigation in violation of Section 10, and the district court granted the requested relief. The court of appeals

[4] In this situation, Section 19, 33 U.S.C. 414, provides that the proceeds of the sale of the wreck by the United States are covered into the Treasury. In an emergency, Section 20, 33 U.S.C. 415, permits the Secretary to remove a wreck summarily. In this event, the cost of removing the wreck is a lien on the vessel and the owner is ultimately required to pay the cost of removal or forfeit his interest in the wreck.

reversed, holding that the industrial wastes were not "obstructions" in violation of the Act and that, even if they were "obstructions," the court could not grant the injunctive relief sought because Congress "has by strong implication excluded the same" (264 F. 2d 289, 301 (C.A. 7)). This Court reversed the court of appeals, holding that the industrial wastes were a prohibited "obstruction" and that, although Section 12 of the Act limited injunctive relief to the removal of "structures" (362 U.S. at 492):

> * * * [T]he Attorney General could bring suit, even though Congress had not given specific authority. The test was whether the United States had an interest to protect or defend. Section 10 of the present Act defines the interest of the United States which the injunction serves. * * * Congress has legislated and made its purpose clear: it has provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation. * * *.

The analogy of the present case to *Republic Steel* is clear and compelling. There, the Court held that the United States has a right to an injunction to protect navigable waters from obstructions prohibited by Section 10. By the same reasoning the government must have a like remedy to protect its interest in the navigability of its waters where the obstruction complained of is the negligent grounding of a vessel in violation of Section 15. By such an injunction the United States may place the burden of removal upon a negligent shipowner, and the shipowner may

not avoid that burden by abandonment (see, *infra*, pp. 11–13). It follows that where the exigencies of the hazard force the United States to remove the sunken vessel, the United States can recover from the negligent shipowner the cost of performing the shipowner's duty. Cf., Restatement, Restitution, Section 115 (1937).[5]

The majority of the court below rejected the principles of *Republic Steel* and held that a negligent

[5] The government made this alternative argument for reimbursement in *Republic Steel*, but this Court found it unnecessary to reach that issue.

In disagreeing with Judge Browning's belief that *Republic Steel* provided a "compelling analogy" (App. A, *infra*, p. 28), the two judges of the majority offered two divergent readings of this Court's opinion in that case. In Judge Madden's view, *Republic Steel* must be read as limited to situations where the criminal sanctions of the Act, 33 U.S.C. 406 and 411, are an ineffectual remedy for violations of Sections 10 and 15. Judge Dumway concluded that it was the policy of the law to protect vessel owners by permitting them to abandon and that, consequently, this Court's decision in *Republic Steel* did not apply to vessel owners.

The Court of Appeals for the Third Circuit read *Republic Steel* yet another way in *United States* v. *Zubik*, 295 F. 2d 53; *viz.*, as limited to a holding that only injunctive relief was available to compel the removal of an obstruction. Under this construction, if the peril to navigation caused by the shipowner's fault is too immediate and serious to await suit, delaying removal while an injunction is sought, the government must bear the expense of removal. On the other hand, if the danger is less acute, the shipowner can be made to bear the expense of alleviating the consequences of his negligence. (The government did not seek certiorari in *Zubik* because this case was then pending in the district court.) While none of these disagrees' suggested limitations upon the scope of *Republic Steel* derives support from this Court's opinion, they have, however, created doubt and uncertainty in an important area of federal law which should be resolved by this Court.

shipowner or charterer is free to thrust upon the United States the cost of fulfilling his statutory duty to remove a sunken vessel. It rested its conclusion essentially upon the fact that the Rivers and Harbors Act does not expressly provide an *in personam* remedy for removal costs and upon its belief that a negligent shipowner possesses an unqualified right to abandon his vessel "with impunity."

We have already pointed out the error of the first ground of the court's decision. *Republic Steel* holds that the government's remedies for violations of the Rivers and Harbors Act are not limited to those expressly detailed by the Act but are co-extensive with its interests as expressed in that Act.

The correctness of this interpretation as applied to the circumstances at issue here is indicated by the fact that the Secretary of War reached the same conclusion in 1901, shortly after passage of the statute. The schooner CASCADE had sunk while dredging the Black River for the City of Loraine, Ohio. When asked whether the burden of removing this vessel rested upon the United States, the Secretary replied that "It is believed the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat and that the burden of removal rests upon them" (App. C., *infra*, pp. 51–52). Subsequently, this administrative interpretation was promulgated. That regulation, 33 C.F.R. 209.410 (App. D., *infra*, pp. 49–50), now provides—

> * * * a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck.

> He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or pay for its removal.

This long-standing administrative construction, while not conclusive, is entitled to great weight. *United States* v. *Republic Steel*, 362 U.S. 482, 490, n. 5; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84.

The second reason given by the court of appeals for its decision—that every shipowner has an unqualified right of abandonment—is also inadequate. There is no general maritime right of abandonment or any right independent of the Limitation of Vessel Owner's Liability Act, 46 U.S.C. 181, *et seq.*, *infra*, p. 49. That Act applies only to the innocent owner of a vessel and permits him to limit his liability "for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forefeiture, done, occasioned, or incurred * * *" (46 U.S.C. 183) to his interest in his vessel. Prior to the passage of the Limitation of Liability Act in 1851, 9 Stat. 635, there was no general American maritime law and, after the passage of that Act, a general American maritime law could be said to exist only to the extent that it coincided therewith. *The Scotland*, 105 U.S. 24, 28–29.

The majority of courts which have considered the question of an owner's right to limit his liability by abandonment have restricted the right,

therefore, to innocent owners and have rejected the assertions of negligent owners that they may abandon their vessels and thereby absolve themselves of liability.[8] The cases cited in the note permit abandonment by innocent owners, but indicate that loss without fault is a prerequisite to the right to termination of a vessel owner's liability by abandonment. The English authorities are in accord with this view. See *Dee Conservancy Board* v. *McConnell* [1928], 2 K.B. 159 (C.A.); *The Ella* [1915], P. 111. Cf., *The Stonedale No. 1* [1954]; 2 All Eng. Rep. 170 (C.A.), affirmed [1955], 2 All Eng. Rep. 689 (H.L.); *The Utopia* [1893], A.C. 492 (P.C.) (dictum).

In short, the holding of the court below that a negligent shipowner has an unqualified right of

[8] See *In re Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass.); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D. Md.), affirmed *sub nom. Ottenheimer* v. *Whitaker*, 198 F. 2d 289 (C.A. 4), denying the right of abandonment where negligence was established. See also *City of Newark* v. *Mills*, 35 F. 2d 140 (C.A. 3); *In re Highland Navigation Corporation*, 24 F. 2d 582 (S.D.N.Y.), affirmed, 29 F. 2d 37 (C.A. 2); *Orrell* v. *Wilmington Iron Works, Inc.*, 89 F. Supp. 418 (E.D.N.C.), affirmed in part, reversed in part, 185 F. 2d 181 (C.A. 4); *Hagan* v. *City of Richmond*, 104 Va. 723, 52 S.E. 385.

On the other hand, the authorities relied upon by the court below for its conclusion that a negligent vessel owner may abandon with impunity are readily distinguishable. As Judge Browning pointed out in his dissenting opinion, these cases either involved nonnegligent vessel owners or never reached the issue of abandonment. *United States* v. *Zubik*, 295 F. 2d 53 (C.A. 3); *Zubik* v. *United States*, 180 F. 2d 278; *The Manhattan*, 10 F. Supp. 45 (E.D. Pa.), affirmed, 85 F. 2d 497 (C.A. 3); *United States* v. *Wilson*, 295 F. 2d 251 (C.A. 2); *Lord* v. *United States*, 286 Fed. 56 (C.A. 6); *United States* v. *Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. Conn.).

abandonment conflicts in principle with this Court's decision in *The Scotland*, *supra*, and with the pronouncements of the federal and state courts applying this principle, and presents an unwarranted innovation in the scope of the Limitation of Liability Act.

2. We believe that the court also erred in interpreting *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, to require rejection of the government's alternative claim that it has a common law right to reimbursement. In *Willamette* the issue was whether erection of a bridge across the Willamette River was a violation of the act of Congress admitting Oregon as a State. In considering whether, if that act did not apply to construction of the bridge, the case was one arising under the Constitution or laws of the United States, the Court stated (*id.* at 8):

> The power of Congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers * * *.

Immediately after the decision, Congress extended the interest of the United States in all navigable waters by enacting the Rivers and Harbors Act of 1890.

In our view, this action eliminated the basis for the Court's conclusion in *Willamette* that there is no common law of the United States prohibiting obstructions in navigable waters. Accordingly, we do not believe that the statement retains vitality here. At

a minimum, however, its application to this wholly different situation warrants review.

It has long been settled that, in any area in which the United States has a proprietary or regulatory interest, it has the concomitant right to protect and maintain that interest. *Cotton* v. *United States*, 11 How. 229; *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273; *In re Debs*, 158 U.S. 564, 584, 585, 599. See also *United States* v. *Republic Steel Corp.*, 362 U.S. 482; *Sanitary District* v. *United States*, 266 U.S. 405, 426. When Congress, by the Rivers and Harbors Act, extended the interest of the United States to include all navigable waters, the traditional rights of the sovereign attached.* The scope of those rights is co-extensive with the interest to be protected. Since the interest of the United States in navigable waters is paramount, *Sanitary District* v. *United States*, *supra*, the reserved rights of the United States must be at least coextensive with its previous rights as sovereign and with the correlative rights of local

*Long before the passage of the Rivers and Harbors Act, Congress had appropriated monies for specific improvements in navigable waters and had also prohibited, designated indirect interferences with navigable waters. When these improvements were threatened, or when individuals were violating other statutes intended to protect navigability, federal courts granted the United States injunctive relief. *United States* v. *North Bloomfield Gravel Min. Co.*, 53 Fed. 625, 628–629 (C.C. N.D. Calif.); *United States* v. *Mississippi and Rum River Boom Co.*, 3 Fed. 548 (C.C. D. Minn.); *United States* v. *Duluth*, 1 Dill. 469, 25 Fed. Cas. 923 (No. 15001). Cf., *United States* v. *Republic Steel Corp.*, 264 F. 2d 289, 303–304 (C.A. 7), reversed, 362 U.S. 482.

sovereigns and private individuals.[9] They include the right to recovery denied by the court of appeals. See, *e.g.*, *Pennsylvania* v. *The Wheeling and Belmont Bridge Co.*, 13 How. 518, 565; *Emery* v. *City of Lowell*, 109 Mass. 197; *Stratford Theater, Inc.* v. *Stratford*, 140 Conn. 422, 101 A. 2d 279.[10]

3. The public importance of the issues involved here is illustrated by the present case. The TEXMAR was removed from Grays Harbor at a cost in excess of $336,000, an amount substantially equivalent to the annual appropriation for the investigation and removal of all wrecks.[11] Such large expenditures are not uncommon. Moreover, the increasing amount of traffic on navigable waters and the increasing size of

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[9] In other common-law jurisdictions, the common-law rights of the proprietors of navigable waters are well defined. See *The Stonedale No. 1* [1954], 2 All Eng. Rep. 170 (C.A.), affirmed [1955], 2 All Eng. Rep. 689 (H.L.); *Dee Conservancy Board* v. *McConnell* [1928], 2 K.B. 159 (C.A.); *Attorney-General of Canada* v. *Reister* [1943] 3 D.L.R. 5ar (Nova Scotia Sup. Ct.). In these jurisdictions, independent of any statutory rights, the proprietor has a right to recover the cost of removing a negligently sunk vessel.

[10] For the reasons noted above (*supra*, pp. 11-13), the fulfillment of this common law right cannot be defeated by the abandonment of the vessel where the grounding is the result of the negligence of the shipowner and charterer.

[11] Between 1954 and 1960 the wreck investigation and removal appropriations totalled $3,485,569, an average of $497,938 per annum. During this same period, a total of 474 wrecks were removed and 931 more were investigated but not removed. See Annual Report of the Chief of Engineers, U.S. Army [hereinafter, Report] 1960, p. 2007; Report, 1959, p. 1993; Report, 1958, p. 1931; Report, 1957, pp. 1915-1916; Report, 1956, pp. 1939-1940; Report, 1955, pp. 1697-1698; Report, 1954, pp. 1641-1642.

vessels and their cargoes make it predictable that such expenses will continue to increase in the future. Another case now pending in the district court gives this point added emphasis. *United States* v. *2,220,000 Pounds Chlorine Cargo ex Barge WYCHEM, et al.* (E.D. La., Adm. No. 668), is a suit by the United States to recover approximately $3,000,000, representing the cost of removing a sunken barge and its inherently dangerous cargo of liquid chlorine gas from the Mississippi River. The government's right of recovery is based upon the negligence of the owners and operators of the barge. The latter have alleged in defense a right to abandon the vessel and her cargo and thereby to cast the burden of removal upon the United States.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER 1963.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 18,027

UNITED STATES OF AMERICA, APPELLANT

vs.

BETHLEHEM STEEL CORPORATION, A CORPORATION, AND CALMAR STEAMSHIP CORPORATION, A CORPORATION AS BAREBOAT CHARTERER OF THE AMERICAN STEAM SCREW TEXMAR, OFFICIAL NO. 247147, APPELLEES

June 19, 1963

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before MADDEN, Judge of the Court of Claims, and BROWNING and DUNIWAY, Circuit Judges

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MADDEN, *Judge:*

This case presents the question whether a ship owner who by his negligence causes the ship to sink in a channel where it will, until removed, constitute an obstruction to navigation, is liable to the United States for the cost incurred by the United States in removing the ship from the channel.

On December 30, 1960, the ship S. S. Texmar of the appellee Bethlehem Steel Company grounded on a

shoal in Grays Harbor, Washington. Attempts to free it were unsuccessful; the ship fractured and became a total loss, obstructing the ship channel. Bethlehem and the other appellee, Calmar Steamship Corporation, which was operating the ship under a bareboat charter from Bethlehem at the time of the ship's grounding, sent certain communications to the United States Army Corps of Engineers and received responses from the Corps of Engineers. On January 13, 1960, the Corps of Engineers notified Bethlehem and Calmar that it was going to proceed to remove the ship from the channel and would charge the expense of doing so to Bethlehem and Calmar. It did so, and the United States says that the cost was in excess of $336,000, after salvage.

Because of the claim of the United States for reimbursement, Bethlehem and Calmar filed a petition in the United States District Court for the Western District of Washington, seeking exoneration from, or limitation of liability of, the expense arising out of the Texmar incident. The United States filed its answer, denying the right of the petitioners to the relief sought by them, and, in addition to its answer, filed a claim against Bethlehem and Calmar for the $336,000 which, it asserted, it had expended in removing the ship to restore the navigability of the channel. The United States asserted that the wrecking of the ship was the result of the negligence of Bethlehem and Calmar, and it specified nine respects in which it asserted that they had been negligent.

Bethlehem and Calmar moved for dismissal of the claim of the United States on the ground that the claim failed to state a cause of action. The district court, on January 11, 1962, dismissed the claim of the United States; and the United States has appealed to this court against that judgment. It asserts that its claim is valid because certain statutes provide for the

liability which it asserts, and because, even in the absence of those statutes, there is such a liability at common law.

Since the district court's judgment was rendered pursuant to a motion to dismiss, we must assume as a fact what the United States asserted in its rejected claim, that is, that the wreck was a result of the negligence of Bethlehem and Calmar. The United States concedes, for the purposes of its argument in this case, that the appellees would not have been liable if the wreck had been the result of misfortune not involving willfulness or negligence. And the appellees concede, similarly, that if they had purposely sunk their ship and thus obstructed a navigable channel they would have been obligated to remove the wreck or pay for its removal.

As we have said, the Government asserts both a statutory and a common law basis for its claim. Adverting for the moment to the question of the common law basis, we suppose that if one owns a right of way over the land of another, and a third person negligently places an obstruction in that way, he would be legally obligated to the owner of the way to remove the obstruction or pay the cost of its removal. And we suppose that if one, by contract or otherwise, were subject to the duty to keep a right of way open for those entitled to use it, and someone negligently placed an obstruction in the way and refused on request to remove it, the person having the duty to keep the way open could remove the obstruction and recover the cost of the removal from the one who had negligently caused the obstruction. If those assumptions are correct, and if the law of waterways is like that of land ways, the Government's argument for a common law basis for its claim would seem to have a substantial basis. We return to this problem later in this opinion.

However, there are federal statutes which have a bearing upon our problem and which, both appellees and the Government urge, support their respective positions. We find the statutes difficult to interpret in their application to our problem. The statutes upon which the parties principally rely are contained in the Rivers and Harbors Appropriation Act of March 3, 1899, 33 U.S.C. §§ 401 to 415.

At the beginning of this opinion we said that, after the wreck of the Texmar, certain communications passed between the appellees and the Government. Three days after the Texmar was wrecked, the appellees sent a telegram to the Army Engineers advising that they were abandoning the wreck to the United States. Ten days later, the Army Engineers, by telegram, refused to accept the tendered abandonment and asserted that the ship was an obstruction to navigation within the meaning of §§ 414 and 415 of Title 33, United States Code; that the Engineers were going to remove or destroy the obstruction; and that the expense of doing so would be charged to the appellees. Shortly thereafter, as we have seen, the Engineers did remove the wreck.

There is no doubt about the right or power of the Government, in the circumstances, to remove the wreck and clear the channel. Section 414[1] is clear as

[1] § 414. *Removal by Secretary of the Army of sunken water craft generally.*

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners

to this power. The Engineers were in no sense officious intermeddlers when they proceeded to remove the wreck from the channel. And § 414 provides that any recovery from the disposal of the wreck shall belong to the United States. But § 414 says nothing with regard to any personal liability of the owner of the vessel to the United States, whether the sinking was intentional, negligent, or by innocent misfortune.

Section 409 of U.S.C. Title 33 says:

> It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to

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of the same: *Provided*, That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water-craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the proposition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.

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> float what is known as sack rafts of timber and logs in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411–416, 418, and 502 of this title.

This section makes it unlawful to do what the appellees did here,[2] i.e., to carelessly sink their vessel in a channel of navigation. They thus became liable, under § 411,[3] to criminal prosecution and a fine of from $500 to $2,500. Section 409 further provides that when a craft is sunk, *accidentally or otherwise*, in a navigable channel, the owner must mark it with a buoy or beacon and maintain the marking until the craft is *removed or abandoned*. Failure to maintain

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[2] It will be remembered that it has not been determined that the appellees negligently sank their ship. The Government alleged that they did, and the allegation was taken as true for the purposes of appellees' motion in the district court and is so taken for the purposes of this appeal.

[3] 33 U.S.C. § 411. *Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally.*

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall

the marking is made unlawful, so that for this failure the criminal provisions of § 411 would again be applicable, and this even though the sinking was *accidental*, which, we suppose, means innocent. Then § 409 imposes the duty on the owner to commence the immediate removal of the wreck and prosecute such removal diligently. Then comes significant but by no means clear language, "and failure to do so [i.e., to diligently prosecute removal] shall be considered an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411–416, 418 and 502 of" Title 33.

The appellees' failure to diligently, or at all, prosecute the removal of their wrecked ship was, by § 409, made the legal equivalent of an abandonment of the ship to the United States. We find nothing in the statutes requiring the United States to accept an offer of abandonment of a ship, whether or not it is obstructing a navigable channel. The Engineers might well determine that it would be more economical to dredge a new channel than to remove a wreck from the former channel. This would depend upon whether there would, in the particular case, be an obligation on the part of the owner to reimburse the United States for its costs, which is, of course, the question in the instant case; and whether, if there would be such an obligation, the owner would be financially able to perform it. In the instant case, the Engineers notified the appellees that the United States was not accepting the offered abandonment of the

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be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction.

Texmar to it. The Engineers said that they were going to clear the channel, pursuant to 33 U.S.C. §§ 414; 415. We quote § 415 in a footnote.*

We look to § 415 for the answer to our problem, and we look in vain. What § 415 gives to the United States when the United States acts pursuant to it is a charge or lien against the craft and cargo which the United States has removed from the channel. In the instant case the security was worthless.

What the pertinent sections of the statutes tell us, then, is that it is unlawful to negligently sink a ship in a navigable channel, § 409; that failure by the

* 33 U.S.C. § 415. *Summary removal of water craft obstructing navigation.*

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 411 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft; so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using his best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

owner to diligently prosecute removal shall permit the United States to take the wreck and make whatever it can out of its salvage, §§ 409, 414; that what the appellees did was a crime punishable by a fine of from $500 to $2500, § 411; that the fact of obstruction of a channel, regardless of abandonment, authorizes the United States to remove the obstruction and have a charge or lien on the ship for the expense of removal, § 415.

The Government argues that since § 409 makes what the appellees did unlawful, and § 411 prescribes a criminal penalty for having done it, a civil liability for the damages caused by the unlawful conduct must follow, though not prescribed in the statutes. This is frequently the rule applicable to conduct made criminally punishable by statute. The Government asserts, rightly, that the United States, as a proprietor, has the same rights which a citizen has to bring the conventional common law actions for protection of its proprietary rights. It cites *Cotton v. United States*, 11 How. 229, holding that the United States could, without any statute authorizing such a suit, sue in trespass for the taking of timber from its land. It cites *United States v. San Jacinto Tin Co.*, 125 U.S. 273, holding that the United States could sue in equity to set aside a patent to lands which patent had been obtained by fraud.

The appellees point out that the United States is not the proprietor of navigable channels such as the one obstructed by the appellees' ship; that the Government's interest in the navigability of such channel arises out of the Constitutional power of Congress to regulate interstate and foreign commerce; that the Government's interest, therefore, is a regulatory and not a proprietary interest.

We think there may be merit in this argument of the appellee. In *Willamette Iron Bridge Co. v.*

Hatch, 125 U.S. 1, the Supreme Court, contrary to a prior opinion of the Attorney General, 6 Op. Atty. Gen. 172, 184, held that there was no federal common law prohibiting obstructions of navigable waters, because Congress had not asserted an interest in such waters by regulating their use, or otherwise. Congress thereafter enacted statutes pertaining to the obstruction of navigable waters, 26 Stat. 426, 454. Against this background, a court should search the statutes carefully to see if they contain answers to legal questions in this area, and should be hesitant about imposing important legal obligations not expressed or fairly clearly implied in the numerous detailed regulatory statutes enacted by Congress.

The Government would perhaps concede that a degree of hesitancy might be in order, but it urges, in effect, that the necessity for the relief which it seeks is so compelling that any enlightened reading of the statutes will discover authority for that relief. It relies heavily upon the recent case of *United States* v. *Republic Steel Corporation*, 362 U.S. 482. In that case the steel mill, located beside a navigable channel, was pumping water from the channel for industrial use, and returning it to the channel through sewers. The mill's settling basins did not remove all the solids from the sewage, and many particles, in suspension in the waste water, flocculated into larger units in the channel, sank to the bottom, and in time reduced the depth of the channel by several feet. The United States sought an injunction to stop the deposit of the waste and to restore the depth of the channel. It relied on 33 U.S.C. § 403, which says:

> § 403. *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.*
>
> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable

> capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

The court in Republic Steel treated the silting of the bottom of the channel as an obstruction within the meaning of § 403. The court then considered whether the remedy of an injunction to forbid the defendant's discharging industrial sewage into the channel without first obtaining a permit from the Department of the Army providing for the removal of solids from the sewage, and a mandatory injunction directing the defendant to restore the channel to its former depth, could be granted. The court recognized that the only section of the Rivers and Harbors Act expressly providing for injunctive relief was § 12 (33 U.S.C. § 406), which spoke of "the removal of any structures * * * erected in violation of the provisions of" several sections of the Act. The court held that the test was "whether the United States had an interest to protect or defend," and that if it had such an interest, an appropriate remedy, injunction in that case, was available to it.

In Republic Steel, if the United States could not have, by injunction, or by a succession of actions for damages measured by the cost to it of frequently dredging the channel, obtained relief against a mill that was persistently creating an obstruction in a navigable channel, its interest in maintaining free navigability would have been seriously impaired. The mill could have, by paying, whenever its silt had built up to the depth of an obstruction, the fine imposed by § 406, in effect operated under a license. The situation clearly called for a legal remedy, and, as the court said, "it [Congress] has provided enough federal law in § 10 [33 U.S.C. § 403] from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the grand design of this legislation."

The Government asks us, in effect, to assume that if Congress had, in enacting the Rivers and Harbors Act, put its mind on the question now before us, it would necessarily have desired that the Government be entitled to reimbursement for the expense of clearing a channel obstructed by the negligence of the owner of a ship. In such a situation, courts go far in finding in a statute what a legislature must have intended to put in it. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 542.

In the instant case it is not clear what Congress would have said if it had spoken expressly to the subject here in question. The appellees urge that before the enactment of the Wreck Statute, i.e., 33 U.S.C. §§ 409, 414 and 415, it was the privilege of the owner of a sunken vessel to abandon it, and if he did abandon it he had no further responsibility with regard to it. In The Manhattan (*United States* v. *Atlantic Refining Co.*), 10 F. Supp. 45 (D.C.E.D. Pa.) the court said:

> "In the absence of any statute and before the enactment of the Wreck Statute,* the owner of a sunken vessel always had the right to abandon her and thus absolve himself from liability for damages caused by the obstruction of the channel. See *Winpenny and Chedester v. Philadelphia*, 65 Pa. 135. The law was that if the sunken vessel is a menace to navigation its disposition is a manner of public concern, and that the owner has suffered sufficient loss in the loss of the craft and no further loss will be imposed upon him by way of damages for subsequent accident, provided always that he has abandoned it."

Other decisions are in accord with *The Manhattan*. In *Loud* v. *United States*, 286 Fed. 56 (Cir. 6) Loud's steam barge collided with an abutment in a channel in St. Mary's River. The War Department cleared the channel by straightening the vessel in the channel, expending $18,459 in the process. The court held that the United States was not entitled to recover this expenditure from Loud and that its only claim was a claim *in rem* against the barge and its cargo. No mention is made in the opinion as to whether or not the sinking was negligent. It would seem that it probably was negligent. In *United States* v. *Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D.C. Conn.), the United States sought an injunction to compel the removal of a canal boat sunk in a navigable channel as a result of the Towing Line's negligence. The court held that the statutory provision, now 33 U.S.C. § 406, authorizing an injunction to compel the removal of "structures erected" in violation of certain sections of the Rivers and Harbors Act of 1899 was not applicable, and denied the injunction. It would seem that if the court had been of the opinion that there was a

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* Sections 409, 414 and 415 of 33 U.S.C. are known as the Wreck Statute.

duty on the part of the Towing Line to remove the wreck, the fact that the relief sought by the United States was a mandatory injunction to remove, rather than reimbursement to the United States, after removal by it, of its expenditures for that purpose, would not have been an obstacle. Cf. *United States* v. *Republic Steel Corporation*, *supra*, 362 U.S. 482. The same may, of course, be said of the denial of an injunction in *United States* v. *Wilson*, 235 F. 2d 251 (Cir. 2). In that case there was no finding of negligence or other fault on the part of the owner of the wreck.

In *The Manhattan*, *supra*, 10 F. Supp. 45, the court held that the United States could not recover, as a part of its damages for the sinking of its barge in a collision with another craft, which collision was due to the fault of the other craft, the cost of raising its barge for the purpose of clearing the channel.

United States v. *Zubik*, 295 F. 2d 53 (Cir. 3) was a case in all essential particulars like our instant case. The court held that the United States could not recover its costs of removing the wrecks from the navigable channel. The court said:

> The sum total of the statutory scheme, excepting its criminal penalty provisions, evidences that the forfeiture right accorded to the Government to remove wrecks obstructing navigable waters is in the nature of an *in rem* right against the removed vessel and not an *in personam* right against the vessel's owner.

In the instant case, the district court, as we have seen, denied the claim of the United States.

The decisions which we have cited constitute an impressive body of authority. There is no decision to the contrary. The Government cites a number of cases in which private proprietors of wharfage or dock space were allowed to recover damages for the obstruction of access to their docks or wharves. *Peti-*

tion of Boat Demand, Inc., 174 F. Supp. 668 (D.C. Mass.); *The Irving F. Ross*; 8 F. 2d 313 (D.C. Mass.); *In re Eastern Transportation Co.*, 102 F. Supp. 913 (D.C. Md.). It cites English decisions under statutes which expressly provide that the owner of a wreck shall bear the expense of removing it from a channel. These decisions are of no assistance in our task of interpreting the Rivers and Harbors Act, or in determining whether, apart from the Act, there is a common law obligation owing to the United States in a case such as the instant one. In *Willamette Iron Bridge Co.* v. *Hatch*, *supra*, 125 U.S. 1, the Supreme Court held that there was no common law of the United States prohibiting obstructions and nuisances in navigable channels. That decision never having been overruled, it is not surprising that no inferior federal court has discussed the question of obstructions of channels and expenditures made by the United States in removing those obstructions on the assumption that there might be an applicable common law doctrine. Indeed, in the case of *United States* v. *Zubik*, *supra*, 294 F. 2d 53 (Cir. 3), the United States did not claim that it had a common law right to reimbursement. *United States* v. *Republic Steel Corporation*, *supra*, 362 U.S. 482, on which the Government relies in our case, was urged upon the court in *Zubik*, but not as having overruled *Willamette*, or held that the United States had common law rights in the navigability of channels. What was urged in *Zubik* was that enough could be found in the statutes to justify a judgment against Zubik, since the Supreme Court had found enough in the statutes to justify a judgment against Republic Steel. We conclude, then, that there has been, and is, no common law basis for a recovery by the Government, and that a judgment in its favor would have to find its basis in the Acts of Congress.

Looking to the Rivers and Harbors Act for the answer to our problem, as we think we must, we find that Congress, though dealing in detail with the many problems arising out of wrecks and obstructions to navigation, has not, though it would have been natural and logical for it to have done so if it so desired, created the right which the Government here asserts.

We conclude, then, that Congress, in the light of the historical law of shipping, which seems to have included a right of an owner to abandon a wreck with impunity, probably did not intend to create, in the Rivers and Harbors Act, the obligations *in personam* which the Government here asserts. If we are correct in this estimate, this court should not read such an obligation into the statutes.

It would not be impertinent to inquire what should be done in the case of an owner who has intentionally scuttled his ship, and thus obstructed a channel. The statutes are as silent about this situation as they are about innocently or negligently created obstructions. In *United States* v. *Hall*, 63 Fed. 472 (Cir. 1), a mandatory injunction was granted compelling the owner, in such a case, to remove the wreck. Obviously the court in such a case would be powerfully impelled toward requiring the owner to remedy his inexcusable wrong. It was the kind of extraordinary case which does not have great value as a precedent. At any rate it has not influenced the courts in the several cases which we have cited, involving, as our case does, negligent sinkings of ships.

The Government cites a regulation promulgated, in 1946, on behalf of the Army Corps of Engineers. It is in 11 F.R. 177 A-828. It says:

> By the maritime law the owner of a vessel which is sunk without fault on his part may abandon the wreck in which case he cannot be held responsible for removing it even though it obstructs navigation. That law has not been

changed by sections 15, 19, and 20 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152, 1154; 33 U.S.C. 409, 414, 415), which fully recognizes the owner's right of abandonment. However, a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or to pay for its removal. 33 C.F.R. 209.410 (1949 ed.)

The last sentence of the regulation would neatly solve our problem. But what it said was contrary to judicial decisions at the time the regulation was issued, and was, if we are correct in our estimate of what the statutes mean, an unauthorized effort to administratively improve the statute.

We think the judgment of the district court was right, and we affirm it.

DUCKWAY, *Circuit Judge*, concurring:

I concur in the foregoing opinion, but I think that the case for affirmance is a little stronger than Judge Madden makes it appear.

I agree that such precedents as there are sustain the conclusion that at common law the liability here asserted did not exist. It follows that if there is any liability it must be based upon the statutes. My reading of those statutes leads me to believe that Congress, in enacting them, did put its mind on the question now before us and intended that the liability should be limited to whatever the United States can get for the vessel. It is true that section 409 states, "it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall

be considered an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411–416, 418, and 502 of this title.". This clause follows the imposition of an obligation to mark the sunken vessel "until [it] * * * is removed or abandoned." Thus, while the statute imposes the duty on the owner to remove, it also deals with what happens when he fails to remove; and specifies only that that failure is an abandonment of the craft and subjects it to removal by the United States.

If we then turn to the statutes dealing with removal by the United States, we find that there are two, sections 414 and 415. Section 414 deals with an obstruction by a sunken vessel, when the obstruction has existed for a longer period than thirty days, or when the abandonment of the vessel can be established in a lesser space of time. It provides that the vessel can be broken up, removed, sold or otherwise disposed of by the Secretary of the Army "without liability for any damage to the owners of the same." This sentence then continues with four consecutive provisos. The first proviso authorizes a published notice "requiring the removal" of the vessel. The second proviso authorizes the Secretary to advertise for bids for the removal, this removal to be done "in case it has not in the meantime been so removed," presumably by the owner; the contract can be conditioned to provide that the vessel and its cargo shall become the property of the contractor. The third proviso requires the contractor to give security. The fourth proviso states that any money received from the sale of any such wreck or under any contract for the removal of the wreck shall be covered into the Treasury of the United States. Thus, in section 414 Congress recognized the right of the owner to abandon the vessel, considered the possible liability of the government to the owner, and provided against such a liability;

and also considered the possible recovery by the government of the cost, as to which it provided for such recovery either through payment by the contractor or through sale of the vessel. *It did not provide for civil liability on the part of the owner or any one else if the moneys derived from the contractor or from the sale of the vessel were insufficient to pay the government's costs.*

The other section is section 415, which deals with emergencies. This section, after providing for the taking of immediate possession of the vessel and removing it, also contains two provisos which are a part of the same sentence. The first proviso again authorizes the giving of notice to the owner requiring him to remove it. The second proviso deals with the expense of removing, and says that it "shall be a charge against such craft and cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo, or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States." *It does not provide for liability on the part of the owner or anyone else if the proceeds of the sale are insufficient to pay the government's costs.* Thus, again, Congress provided for giving the owner an opportunity to remove, and specifically dealt with the expense of removal. It even expressly dealt with failure or refusal by the owner to reimburse the United States for such expense. The only remedy it provided was a sale of the craft or cargo, the proceeds to be covered into the Treasury. Surely the alternative of a remedy by suit against the owner for the amount of the expense could not have escaped the attention of the draftsmen, but they did not provide for it.

My views are reinforced by another statute. Section 412 makes a vessel used or employed in violating section 409 liable both for the pecuniary penalties specified in section 411, and in addition for the amount of damages done by it. The mode of recovery is "summarily by way of libel" against the vessel. *Action in personam against the owner for damages is not provided for.*

I think that these statutes demonstrate that Congress did consider the question now before us, that it was aware of the principle stated in *The Manhattan*, E.D. Pa., 1935, 10 Fed. Supp. 45, and quoted in Judge Madden's opinion. That principle is that the owner has a right to abandon and thus absolve himself from liability, and its correlative is that the removal of a sunken vessel which is a menace to navigation is a public responsibility, the owner having suffered sufficient loss by the loss of a ship, once he abandons it. I therefore think that *United States v. Republic Steel Corp.*, 1960, 362 U.S. 482, which did not involve a vessel, does not require a different result. Here the amount involved is large, and the owner is presumably fully able to pay it. But there are still many shipowners in this country, some of them very small businessmen indeed, such as fishermen, who own but one ship, who have all of their capital tied up in that ship, and to whom the loss of such a ship is an almost irreparable disaster. Imposition upon them of the cost of removing such a ship when it is sunk could make the disaster truly irreparable. I do not think that the Courts should invent such a result when the Congress has not provided for it. The matter should be left to the Congress, so that the conflicting interests involved can be heard and the relative merits of their varying positions can be evaluated, first by appropriate committees and then by the Congress as a whole. (See *United States v. Standard Oil Co.*, 1947, 332 U.S. 301, 314–17.)

BROWNING, *Circuit Judge*, dissenting.

The relevant statutes are, indeed, "difficult to interpret in their application to our problem," but a construction which affords the United States the remedy which it seeks is strongly suggested by *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960).

Appellees' alleged conduct in negligently sinking a ship in a navigable channel concededly violated 33 U.S.C. § 409.[1] Section 409, like Section 403, reflects the interest of the United States in the unobstructed navigability of its waters. *Republic Steel* holds that to protect this interest an injunctive remedy must be implied against those who create unauthorized obstructions in violation of Section 403; therefore a like remedy is to be implied against those who voluntarily or carelessly sink vessels in navigable channels in violation of Section 409. Since the United States

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[1] It may have violated 33 U.S.C. § 403 as well. In common usage the term "obstruction" would include a sunken vessel in navigable water. It has this meaning in 33 U.S.C. § 414 and § 415. The term as used in § 10 of the Act of Sept. 19, 1890, was said to include "anything, wherever done or however done * * * which tends to destroy the navigable capacity of one of the navigable waters of the United States." *United States v. Rio Grande Irrigating Co.*, 174 U.S. 690, 708 (1899), and this broad definition was applied to the term in § 403 of the present Act in *United States v. Republic Steel Corp.*, 362 U.S. 482, 487–88 (1960). In *United States v. Wilson*, 255 F. 2d 251 (2d Cir. 1958), it was assumed that the term, as used in § 403, extended to vessels. The same assumption was made by the court in *United States v. Bridgeport Towing Line, Inc.*, 15 F. 2d 240 (D. Conn. 1926), although the court also held that § 403 was not violated by negligent or accidental acts as distinguished from "consciously directed action." See also *United States v. Hall*, 63 Fed. 472, 474–75 (1st Cir. 1894), holding a vessel to be an "obstruction" within the provisions of § 10 of the Act of Sept. 19, 1890. But see *In re Eastern Transp. Co.*, 102 F. Supp. 913, 915–16 (D. Md. 1952), aff'd sub nom. *Ottenheimer v. Whitaker*, 198 F. 2d 289 (4th Cir. 1952).

may be mandatory injunction impose the burden of removal upon one who sinks a ship in violation of Section 409, the government should not be denied restitution if it is compelled to assume the costs of removal by the refusal of the wrongdoer to discharge his duty. See Restatement, Restitution § 115 (1937).

Neither of the reasons advanced in support of the contrary result seems sufficiently strong to overcome the compelling analogy of *Republic Steel*.

1. It is argued that an injunctive remedy was implied in *Republic Steel* because the peculiar factual circumstances of that case made imposition of the fine provided by 33 U.S.C.A. § 406 an ineffectual remedy. But the statute also provided for imprisonment of the persons involved for up to one year, which would seem to be an effective deterrent. Moreover, if the deterrent effect of the fine alone were determinative, the government points out that disposing of an obsolete vessel is often a burdensome and expensive undertaking, and that liability for a fine "not exceeding $2500" (33 U.S.C. § 411) in return for the privilege of "voluntarily or carelessly sinking" a worthless vessel in some spot convenient to the owner would not be a deterrent, but a tempting bargain.

2. The second argument against implying an *in personam* remedy for violation of Section 409 on the basis of *Republic Steel* is that the pertinent statutory language, read in the light of an asserted right of the owner of a sunken vessel to abandon it, reveals a congressional purpose to confine the government's remedy to recovery *in rem* against the sunken ship. The mandate of the statute ("It shall not be lawful * * * to voluntarily or carelessly sink, or permit

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Compare *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), in which the Supreme Court rejected the suggestion that it should create, not merely a remedy to protect [illegible] interest, but a new basis for liability not founded

or cause to be sunk, vessels or other craft in navigable channels * * *") is directed against personal conduct,[5] and does not depend at all upon ownership of the vessel sunk.

If, as the analogy of *Republic Steel* suggests, a civil remedy is to be implied to protect the interests of the United States reflected in the prohibition in Section 409, the remedy should be co-extensive with the statutory prohibition: it should be available against the wrongdoer whether or not he is also the owner of the vessel. An innocent shipowner should be free of removal costs because his innocence places him beyond the reach of the prohibition in Section 409; but one who voluntarily or carelessly sinks a vessel should not be permitted to avoid liability for the costs of his wrongdoing simply because he happens also to own the vessel, and chooses, in his own interest, to abandon it.

The pertinent court decisions are few, and divided.[6] However, the suggested reading of the statute is supported by the administrative interpretation adopted by the Army Corps of Engineers,[7] which, "while not

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[5] One who willfully commits the acts prohibited by § 409 may be fined and imprisoned, and, if he is a licensed master pilot or engineer, is subject to the additional penalty of loss or suspension of his license. 33 U.S.C. § 412.

[6] The imposition of liability under § 409 where the sinking is deliberate or negligent is supported by the rationale of Chief Judge Coleman's decision in *In re Eastern Transp. Co.*, 102 F. Supp. 983, 986-87 (D. Md. 1952), although the sinking in that case was not only voluntary but also only proposed. The recent holding of the Court of Appeals of the Third Circuit in *United States v. Zukerkorn*, 295 F. 2d 58 (3d Cir. 1961), and of the District Court in *The Mandalay*, 10 F. Supp. 45, 50-51 (E.D. Pa. 1935), are to the contrary. The latter case held that removal costs would not be recovered from a third party who negligently caused a vessel to be sunk in a navigable channel.

[7] 33 C.F.R. 209.130 (1962), last published at 11 Fed. Reg. 177 (Aug. 29, 1946), reads:

conclusive of course, is entitled to 'great weight.'" *United States v. Republic Steel Corp.*, 362 U.S. 482, 490 n. 5 (1960).[*] It is probably supported, too, by the concession of appellees, and of this Court, that the United States may obtain a personal judgment against the wrongdoers for removal costs if the sinking is deliberate. Since appellees and the Court reject any common-law basis for recovery, this conceded liability must rest on statute. If liability is based on Section 409[†] it must exist whether the sinking is caused deliberately "or carelessly."

The provisions of Section 409 and its related sections relied upon by appellees are not inconsistent with this construction.

The concluding provisions in the last sentence of Section 409, which impose a duty upon the owner of

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"*Abandonment of wrecks*

"By the maritime law the owner of a vessel which is sunk without fault on his part may abandon the wreck in which case he cannot be held responsible for removing it even though it obstructs navigation. That law has not been changed by sections 13, 19, and 20 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152, 1154; 33 U.S.C. 409, 414, 415), which fully recognize the owner's right of abandonment. However, a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or to pay for its removal."

[*] See *H. K. Porter Co. v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).

[†] The only other possible statutory basis for liability would appear to be § 403. See note 1, *supra*. See also *United States v. Hall*, 63 Fed. 472 (1st Cir. 1894), which was decided, however, before the express prohibition of deliberate or careless sinkings in what is now § 409 came into the law as § 15 of the Act of March 3, 1899, 30 Stat. 1152.

a sunken vessel to mark the wreck and proceed diligently to remove it, are wholly distinct in purpose and application from the prohibition of negligent or willful sinkings. The obligations which these provisions impose have nothing to do with fault; they are solely a consequence of ownership, and the statute appropriately states that they may be terminated by abandonment of ownership. There is no reason to imply a similar limitation upon the remedy available against a wrongdoer who violates the prohibition against deliberately or negligently sinking a vessel (which he may or may not own).

Similarly, Sections 414 and 415, authorizing the Secretary of the Army to remove and dispose of wrecks, are independent of the prohibition of negligent or willful sinkings. The purpose of these provisions, like that of the provisions in the last sentence of Section 409, is to regulate the relationship between the Secretary and the owner of the wreck; they apply without regard to the cause of sinking. There is nothing in their language or purpose to suggest

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It is true that § 414 allows the Secretary to dispose of an abandoned wreck and § 415 gives the Secretary a lien against a vessel for removal costs where the craft is not abandoned, but these specific provisions for economic recovery against the vessel do not argue against imposing liability upon the wrongdoer. As noted, identity of wrongdoer and shipowner would be only coincidental. Even where it occurred, the value of the wreck, as in the present case, might bear no relation to the costs of removal.

The same comment applies to the provision of § 412 that a vessel "used or employed" in violating § 409 shall be liable for the pecuniary penalties specified in § 411, and for the damage done by the vessel.

The purpose of what are now §§ 414 and § 415, is summarized in H. R. Rep. No. 1826, 55th Cong., 3d Sess. 4 (1899):

"Sections 6 and 7 relate to the removal of wrecks from harbors and navigable channels. Under the present law unnecessary delay might occur in removing obstacles from navigable waters.

that Congress intended Sections 414 and 415 in any way to affect the civil liability of a wrongdoer (one who is perhaps a stranger to the owner), who caused the wreck in violation of Section 409.

Nor can an intention to limit the liability of such a wrongder be drawn from a general doctrine allowing a shipowner to abandon his vessel without liability.

First, the privilege applies only to a shipowner, whereas the prohibition of Section 409 applies to all who negligently or willfully sink vessels in navigable channels. Second, it has not been demonstrated that the asserted privilege is applicable at all in the only circumstances in which Section 409 applies, that is, where the wreck results from negligent or willful conduct. The government contends that the privilege of terminating liability by abandonment, like the statutory right of a vessel owner to limit liability,[10] is available only if the owner is without "privity or knowledge." Appellees assert that the privilege is absolute, or at least is not barred by negligent conduct, as distinguished from conduct which is willful. The authorities cited to the issue by both side are at best meager and inconclusive.[11] Giving appellees

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and serious injury to commerce might result from the lack of an efficient and prompt remedy for clearing channels which may be encumbered by wrecks. This Act modifies the existing law. It contains two provisions—section 6, providing for ordinary cases, the scope of which is not greatly different from existing statutes on the subject. The second, or section 7, provides for emergencies, and authorizes the immediate removal or destruction of such wrecks or obstructions as stop or endanger navigation. It is thought that the two sections afford provision for the interests of commerce and at the same time give to the owners of wrecks and abandoned property all possible protection consistent with the essential interest of navigation."

[10] 46 U.S.C.A. § 183; Gilmore and Black, The Law of Admiralty 695-97 (1957).

[11] Appellees' authorities, considered in chronological order, are: *Loud* v. *United States*, 286 Fed. 56 (6th Cir. 1923), which

the benefit of every doubt, these authorities do not establish with sufficient certainty the existence of a privilege available despite negligence so as to justify the assumption that Congress drew the unequivocal prohibitory language of Section 409 with such an exemption in mind, or intended the remedies for the enforcement of Section 409 to be limited by such an exemption.

(Endorsed) Opinion and concurring and dissenting Opinions filed June 19, 1963.

FRANK H. SCHMID, *Clerk*.

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denied recovery of removal expenses against the ship under § 415 because the government failed to assert its lien but, so far as appeared, involved neither negligence nor abandonment; *United States* v. *Bridgeport Towing Line Inc.*, 15 F. 2d 240 (D. Conn. 1926), which denied an injunction under § 403, on the ground that negligent sinkings, as distinguished from those deliberately caused, were not within that section; *The Manhattan*, 10 F. Supp. 45 (E.D. Pa. 1935), which is relevant to another point (see note 4) but which involved neither a negligent owner of a sunken ship nor abandonment; *Zubik* v. *United States*, 190 F. 2d 278 (3d Cir. 1951), in which the pertinent comment is admittedly dicta; *United States* v. *Wilson*, 235 F. 2d 251 (2d Cir. 1956), which involved no negligence, and which was based upon a limitation of remedies drawn from § 406 which was expressly rejected in *Republic Steel* (a comment also applicable to *Bridgeport Towing*, *supra*); and *United States* v. *Zubik*, 295 F. 2d 53 (3d Cir. 1961), which is factually in point, but relies not at all upon the right to abandon but rather upon the court's reading of the pertinent sections as limiting the government to *in rem* recovery.

Appellant relies upon the holding in *Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass. 1959), imposing liability for removal expense upon the negligent boat owner despite attempted abandonment, though on the suit not of the United States but of the owner of the wharf at which the vessel rested; and upon language in *In re Highland Nav. Corp.*, 24 F. 2d 582 (S.D.N.Y. 1927), and *Hagan* v. *City of Richmond*, 104 Va. 723, 52 S.E. 385 (1905), indicating that abandonment limits liability only if the sinking was without fault of the owner.

[Title of District Court and Cause.]

ORDER OF DISMISSAL

Decision on the objection of petitioners to the claim of the United States has been deferred pending a possible appeal of *United States* v. *Zubik*, 295 F. 2d 53 (3 Cir. 1961). It is now reported that appeal is not to be taken in that case.

Petitioners' objection and the memoranda and oral argument thereon previously submitted have been fully considered. While the ruling of *Zubik* is not free from doubt, the decision is squarely in point and it has been concluded that this Court ought to follow that authority. Accordingly, it is hereby

Ordered that the objection of petitioners to the claim of the United States be and hereby is sustained and said claim is hereby dismissed.

Dated this 11th day of January, 1962.

(S) GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed Jan. 11, 1962.

APPENDIX B

The Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, *et seq.*, 33 U.S.C. 403, *et seq.*, provides in pertinent part:

33 U.S.C.:

§ 403. *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army, prior to beginning the same.

* * * * * * *

§ 409. *Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels.*

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in

such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411–416, 418, and 502 of this title.

* * * * *

§ 411. *Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally.*

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine

to be paid to the person or persons giving information which shall lead to conviction.

* * * * *

§ 414. *Removal by Secretary of the Army of sunken water craft generally.*

Whenever the navigation of any river, lake, harbor, sound, bay, canal, or other navigable waters of the United States shall be obstructed or endangered by any sunken vessel, boat, water craft, raft, or other similar obstruction, and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a less space of time, the sunken vessel, boat, water craft, raft, or other obstruction shall be subject to be broken up, removed, sold, or otherwise disposed of by the Secretary of the Army at his discretion, without liability for any damage to the owners of the same: *Provided*, That in his discretion, the Secretary of the Army may cause reasonable notice of such obstruction, of not less than thirty days, unless the legal abandonment of the obstruction can be established in a less time, to be given by publication, addressed "To whom it may concern," in a newspaper published nearest to the locality of the obstruction, requiring the removal thereof: *And provided also*, That the Secretary of the Army may, in his discretion, at or after the time of giving such notice, cause sealed proposals to be solicited by public advertisement, giving reasonable notice of not less than ten days, for the removal of such obstruction as soon as possible after the expiration of the above specified thirty days' notice, in case it has not in the meantime been so removed, these proposals and contracts, at his discretion, to be conditioned that such vessel, boat, water craft, raft, or other obstruction, and all cargo and property contained therein, shall become the property of the contractor, and the contract shall be awarded to the bidder making the prop-

osition most advantageous to the United States: *Provided*, That such bidder shall give satisfactory security to execute the work: *Provided further*, That any money received from the sale of any such wreck, or from any contractor for the removal of wrecks, under this paragraph shall be covered into the Treasury of the United States.

* * * * *

33 U.S.C. 415. *Summary removal of water-craft obstructing navigation.*

Under emergency, in the case of any vessel, boat, water craft, or raft, or other similar obstruction, sinking or grounding, or being unnecessarily delayed in any Government canal or lock, or in any navigable waters mentioned in section 414 of this title, in such manner as to stop, seriously interfere with, or specially endanger navigation, in the opinion of the Secretary of the Army, or any agent of the United States to whom the Secretary may delegate proper authority, the Secretary of the Army or any such agent shall have the right to take immediate possession of such boat, vessel, or other water craft, or raft, so far as to remove or to destroy it and to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused, using the best judgment to prevent any unnecessary injury; and no one shall interfere with or prevent such removal or destruction: *Provided*, That the officer or agent charged with the removal or destruction of an obstruction under this section may in his discretion give notice in writing to the owners of any such obstruction requiring them to remove it: *And provided further*, That the expense of removing any such obstruction as aforesaid shall be a charge against such craft or cargo; and if the owners thereof fail or refuse to reimburse the United States for such expense within thirty days after notification, then the officer or agent aforesaid may sell the craft or cargo,

or any part thereof that may not have been destroyed in removal, and the proceeds of such sale shall be covered into the Treasury of the United States.

The Limitation of Vessel Owner's Liability Act, 46 U.S.C. 181, *et seq.*, provides in pertinent part:

> § 183. *Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."*
>
> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.
>
> * * *
>
> § 186. *Charterer may be deemed owner.*
>
> The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

Section 209.410 of 33 Code of Federal Regulations provides in pertinent part:

> 209.410. *Abandonment of wrecks.*
>
> By the maritime law the owner of a vessel which is sunk without fault on his part may abandon the wreck in which case he cannot be

held responsible for removing it even though it obstructs navigation. That law has not been changed by section 15, 19, and 20 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1152, 1154; 33 U.S.C. 409, 414, 415), which fully recognizes the owner's right of abandonment. However, a person who willfully or negligently permits a vessel to sink in navigable waters of the United States may not relieve himself from all liability by merely abandoning the wreck. He may be found guilty of a misdemeanor and punished by fine, imprisonment, or both, and in addition may have his license revoked or suspended. He may also be compelled to remove the wreck as a public nuisance or to pay for its removal.

APPENDIX C

Subject: "Cascade" Schooner, Wreck of, in Black River of Loraine, Ohio
From: Acting Chief of Engineers

PURPORT OF COMMUNICATION

JULY 10, 1901.

Returns telegram of Wm. L. Hughes dated Loraine, Ohio asking whether the removal of a boat sunken in the harbor at that point rests upon the owner or the U.S. and states that he has reference to the sunken schooner "Cascade" lying in the Black River at Loraine Ohio and as between the city and the owner of the boat it is not necessary for the WD to decide but is of opinion the burden of removal does not rest upon the U.S. that the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat and that the burden of removal rests upon them. Recommends Mr. Hughes be so informed.

Letter of Alex J. Savord, U.S. Inspector reporting on the matter herewith (Incl 1)

July 11 Reed Rec Div th C C. 1 p.m.

July 15, Back Rec Div th JAG for remark 1:40 p.m.

July 22, Back Rec Div with JAG indorsed report of even date that he is of opinion that under the circumstances the W. D. should not remove this wreck.

July 23 To C.C. 11:50 a.m.

W.D.W., *July 31, 1901.*

WM. L. HUGHES, Esq.,
Lawyer,
Lorraine, Ohio

SIR: I have the honor to acknowledge the receipt of your telegram of the 29th ultimo, as follows:

"Boat sinks in harbor. Neglect of owners, does Government, owners or city remove same."

In reply, I beg to advise you that your telegram was referred to the local engineer officer of the Department at Cleveland and that from a report made to him by an inspector, it was found that your inquiry has reference to the sunken schooner "Cascade" which was at one time used by a contractor engaged in dredging in Black River for the city of Lorain, and which after the completion of the work, was left by the contractor, where anchored or tied up, and eventually sunk.

Replying to the question whether the burden of removing this boat rests upon the United States, upon the owner by whose negligence it was sunk or upon the city of Lorain in whose service the boat was engaged, you are advised that as between the city and the owner of the boat it is not necessary for the War Department to decide, but that under the circumstances stated, the burden of removing the boat does not rest upon the United States. It is believed the vessel constitutes an obstruction caused by the voluntary or careless acts of those owning or controlling the boat, and that the burden of removal rests upon them.

Very respectfully,

WM. CARY SAWYER,
Acting Secretary of War.

Mailed Aug. 1, 1901.
Aug. 1, Back Rec Div the C of C 10:25 a.m. Aug. 2.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PETITIONER

v.

BETHLEHEM STEEL CORPORATION et al.

Brief for Respondents in Opposition

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FRAYN PRINTING COMPANY

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*These sections are mentioned throughout the brief.

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PETITIONER

v.

BETHLEHEM STEEL CORPORATION et al.

Brief for Respondents in Opposition

QUESTIONS PRESENTED

In its pleadings in district court and in its statement of points on appeal in the court of appeals the government repeatedly alleged that TEXMAR sank. (Answer, par. IX, R. 18, 19, 20; Claim, par. VII, R. 24, 25, 26; Statement of Points, par. 1, R. 54). We infer that the government alleged a sinking in order to take advantage of 33 U.S.C. § 409, which makes it a crime to carelessly sink a vessel, and which forms the springboard for petitioner's argument about "statutory duty". Whatever the reason, the court of appeals took the government's allegations at face value:

> "This case presents the question whether a ship owner who by his negligence causes the ship to sink in a channel where it will, until removed, constitute an obstruction to navigation, is liable to the United States for the cost incurred by the United States in

removing the ship from the channel." 319 F. 2d, 513.

We know and the government knows that the TEXMAR did not sink. But we are obliged to take the government's allegations as true—as its attorney swears, R. 41—and petitioner cannot now change the premise of its case, asking this court to review something the courts below were not called upon to consider.

We suggest that the only question here can be the question raised by the pleadings and considered by the court of appeals, as stated above by Judge Madden.

STATUTES AND REGULATION INVOLVED

We do not agree that the Limitation of Vessel Owner's Liability Act is involved in this appeal. Assuming as we must that petitioner's allegations are true, respondents have no right to limit their liability. The question is whether petitioner has any *in personam* claim against respondents for the expense of wreck removal.

STATEMENT

Petitioner made no mention of the fog which was the reason for this accident in the first place. (R. 6, 23).

Petitioner implied that respondents gave something less than a full abandonment of the wreck. (Pet., 3) In fact, Bethlehem, the sole owner of the TEXMAR, abandoned all of its interest in the wreck four days after the accident. (Answer, par. VI, R. 17) Calmer Steamship Corporation, the car-

rier, salvaged what cargo it could for the benefit of the cargo owners, after their representatives refused to do anything. (R. 34-37)

The government made no move to save any cargo. (R. 48)

ARGUMENT

This case concerns the accidental sinking—or, as the government now argues, stranding — of the steamer TEXMAR, a ship outbound from Aberdeen with a full cargo. The ship ran aground in a public channel in Grays Harbor and broke her back. She was then a wreck.

No court in the United States or in England has ever denied a shipowner the right to abandon the wreck in such circumstances.

In a series of no less than six decisions starting with *Loud v. United States*, 286 Fed. 56 (6 Cir. 1923), our Federal courts have consistently held that the Wreck Statute, 33 USC §§ 409, 414, 415, confirms the right to abandon a wreck and that it does not impose any *in personam* liability on the former owner for expenses incurred by the government in removing a wreck from a public channel. As summarized in *The MANHATTAN* (United States v. Atlantic Refining Co.), 10 F. Supp. 45, 49, approved on appeal, 85 F.2d 427, 429 (3 Cir. 1936), cert. denied, sub nom. *United States vs. The BESSEMER*, 300 U.S. 654:

> "... In the absence of any statute and before the enactment of the Wreck Statute, the owner of a sunken vessel always had the

1. Citations and facts in each case are set out in Appendix A

> "right to abandon her and thus entirely absolve himself from liability for damages caused by the obstruction of the channel. See *Winpenny and Chedester v Philadelphia*, 65 Pa. 135. The theory of the law was that if the sunken vessel is a menace to navigation its disposition is a matter of public concern, and that the owner has suffered sufficient loss in the loss of the craft and no further loss will be imposed upon him by way of damages for subsequent accident, provided always that he has abandoned it. *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Company* (D.C.) 17 F.2d 858. . . . "The Wreck Statute, U.S.C. tit. 33, §§ 409, 414, 415 (33 USCA §§ 409, 414, 415), did not materially change the law in this respect."

Congress can at any time change this law. In particular it can impose *in personam* liability upon the former owner for expenses of wreck removal, as is done expressly by English acts and by numerous nineteenth century state statutes and local ordinances.[2] Indeed, our Federal Wreck Statute is almost unique in omitting such provision. But what petitioner asks is a judicial fiat to insert it anyway. *United States v. Zubik*, 295 F.2d 53, 54, 55 (3 Cir. 1961); *United States v. Bethlehem Steel Corp. et al.*, below, 319 F.2d 512, 520 (9 Cir. 1963).

The decision below does not collide with the ruling in *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). Wrecks — accidental obstructions — have always been considered differently than purprestures and other volitional obstructions to navigation. Our Wreck Statute evolved from legislation wholly disassociated from Sec. 403, upon which

[2] Typical statutes and ordinance are set out in Appendix B

petitioner relies. Indeed, if a wreck is an "obstruction" within the ambit of Sec. 403, as suggested by Judge Browning, what is the point to the Wreck Statute? Talk about negligence is meaningless, because Sec. 403 is said to prohibit "anything, whatever done or however done *** which tends to destroy the navigable capacity."

Petitioner's argument implies that the Wreck Statute itself is superfluous, whereas the Statute's history gives it cogent meaning which altogether discredits that argument.

The alleged "administrative interpretation" of the Wreck Statute is perhaps best answered in a recent Army publication:

> "The owners of a sunken vessel, of course, have the primary right to remove it. Once abandonment has been established, however, the United States may apply such value as the sunken vessel may have to the payment of the cost of removal. In removing an abandoned sunken vessel from the navigable waters of the United States, the United States is limited in its recovery to the value of the vessel and its cargo. A claim for further reimbursement against the owners may not be made."
>
> Department of the Army pamphlet 27-164, MILITARY RESERVATIONS AND NAVIGABLE WATERS (July 1961), Par. 99. Removal of Sunken Vessels, p. 182.

3. Full text of Par. 99 is set out in Appendix C.

1. The Wreck Statute specifies the owner's right to abandon a wreck, and the government's remedies against the wreck and against those responsible for the wreck

The sense of the Wreck Statute, and of the difference between it and the other parts of the Rivers and Harbors Appropriation Act of 1899, are best gleaned by considering the advances in law and the problems which confronted Congress in the Nineteenth Century.

Starting with a tentative act in 1824, Congress embarked upon an historic program to improve and maintain our rivers and harbors to aid navigation.[4] In 1836 it made a specific appropriation to remove a wreck in the harbor of New Bedford, and thereafter it made other such specific appropriations until a general statute was finally made to cover removal of wrecks, in 1880.

Four things hindered the engineers. First, and foremost, the district engineer had to have an appropriation to spend money upon a particular wreck or upon the particular waterway obstructed by the wreck. See 12 Op. Atty. Gen. 494 (1868), concerning the wreck of the steamship SCOTLAND, and 15 Op. Atty. Gen. 284 (1877), concerning the wreck of the schooner E. F. MEANY.

Second, the district engineer needed some assurance that the wreck was abandoned and that he would not be destroying someone's property. There was no presumption of abandonment, and no prescribed procedure whereby the former owners could give notice of abandonment.

4. Citations to early statutes are set out in Appendix D.

Third, shipping needed protection against wrecks in navigable channels, whether or not they were abandoned. *The SWAN*, 23 Fed. Cas. 495, No. 13,667 (CC, SDNY 1855), had ruled that an innocent owner had no duty to mark the wreck. *Worth v. Steam-tug WM. MURTAGH*, 6 Fed. 192 (EDNY 1881), ruled that the offending ship was not liable to another vessel for failing to raise or mark the vessel it sank.

Fourth, public authorities were balked by salvors who took months and sometimes years trying to salvage a wreck which endangered navigation. For exemple, the steamship "SCOTLAND" was wrecked off Sandy Hook in 1866. Two years later it was still there. Congress appropriated $100,000 to remove it, but private salvors tried to keep possession of the wreck nevertheless. See Appropriation Act of July 25, 1868, 15 Stat. 174, and 12 Op. Atty. Gen. 494 (1868).

The first Federal wreck statute, Sec. 4 of the Rivers and Harbors Appropriation Act of 1880, 21 Stat. 197, gave the War Department power to advertise notice to establish as a matter of law that a sunken wreck was derelict. It made a permanent appropriation for the removal of wrecks from any river, lake, harbor, or bay, or other navigable water of the United States.

This statute was amended by the next Congress (1882) to allow sale of the sunken wreck to the contractor as it lay. 22 Stat. 208.

In 1890 Congress added a provision that wrecks not raised within two months were subject to be broken up or removed by the War Department

without liability for any damage to the owners. 26 Stat. 454, Sec. 8.

The Rivers and Harbors Appropriation Act of 1899, sec. 19, 30 Stat. 1154, consolidated the foregoing acts, casting them in new form and shortening the time for presumptive abandonment to 30 days. At the same time (1899) Congress solved the third and fourth problems above mentioned, by imposing an absolute duty upon the vessel owner to mark his sunken wreck until such time as he either raised it or abandoned it, and by requiring him to proceed immediately with removal if he intended to salvage the wreck. Sec. 15 (now 33 USC § 409).

In summary, the Wreck Statute as now constituted makes it a misdemeanor to voluntarily or carelessly sink a vessel in a navigable channel, and requires the owner of any vessel wrecked and sunk in a navigable channel to mark it immediately and to maintain the marker until the wreck is removed or abandoned. If he intends to salvage he has to start immediately and prosecute such removal diligently; otherwise, the wreck is considered abandoned. 33 USC § 409

Every person and every corporation that violates Sec. 409 is subject to fine or imprisonment. 33 USC § 411.

Any vessel used or employed in violating Sec. 409 is liable for the pecuniary penalties specified in Sec. 411. If sunk and abandoned, the wreck is forfeit if the District Engineer determines to remove it as an obstruction to navigation. 33 USC § 414.

Whether sunk or not, and whether abandoned or not, a vessel which seriously interferes with navigation is subject to immediate seizure and removal or destruction, at the vessel's expense. 33 USC § 415.

The permanent appropriation for expenses of wreck removal is continued in 31 USC § 725a.

2. The general obstruction statute, Sec. 403, was part of a scheme to solve problems other than shipwrecks

The very cases which petitioner cites demonstrate other problems which confronted shipping in the Nineteenth Century—hydraulic mine tailings, rotting hulks, low bridges, damage to improvements already built by the engineers, etc. An indictable nuisance could be enjoined by a State. *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138 (1884). But there was no correlative "common law of the United States" which prohibited obstructions in navigable waters. *Willamette Iron Bridge Co. v. Hatch*, 125 US 1, 8, 31 L.ed. 629, 632, 8 S.Ct. 811 (1888).

> "It is for Congress to determine when its full power shall be brought into activity, and as to the regulations and sanctions which shall be provided." *Gilman v. Philadelphia*, 3 Wall. 713, 725 (1866).

Thus it was that in August, 1888, five months after *Willamette Iron Bridge Co.*, Congress passed an act controlling the height, span, and placement of bridges and bridge piers and abutments. Rivers and Harbors Appropriation Act of 1888, 25 Stat.

400, 423, 424, 425. Two years later Congress made it unlawful to cast off stone, earth, rubbish, wreck, or other waste of any kind which might obstruct navigation; made it unlawful to build any wharf, dam, breakwater, or structure of any kind which might obstruct navigation; and, generally, prohibited the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters of the United States. Rivers and Harbors Appropriation Act of 1890, Secs. 6, 7, 10, 26 Stat. 453, 454. Shipwrecks were not considered within the purview of these sections. They were dealt with separately, in Sec. 8, 26 Stat. 454, already mentioned.

The 1899 act, 30 Stat. 1121, 1151-1155, brought all of these general statutes together, in somewhat revised form. The bill was represented to Congress as a codification of existing laws with no essential changes. 32 Cong. Rec. 2297 (Senate), 2923 (House). Significantly, Congress did not merge the Wreck Statute with the "general obstruction statute", and provided different remedies. Compare Sec. 12, now amended and appearing as 33 USC § 406, with Sec. 16, now appearing as 33 USC §§ 411, 412.

Section 403 does not apply to shipwrecks. *United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240, 241 (D. Conn. 1926); *In re Eastern Transportation Co.*, 102 F.Supp. 913, 916 (D. Md. 1952), aff'd sub nom. *Ottenheimer v. Whittaker*, 198 F.2d 289 (4 Cir. 1952); *United States v. Wilson*, 235 F.2d 251, 253 (2 Cir. 1956).

To give "obstructions" proscribed in Sec. 403 such broad sweep that they embrace shipwrecks

dealt with in Sec. 409 might be good rhetorical logic, but it is historical nonsense.

It was for this reason that both the Third Circuit and the Ninth Circuit agreed:

> "*United States v. Republic Steel Corp.*, supra, has no impact upon the issue in the instant case. The questions there presented and decided are entirely unrelated to the problem here involved."

United States v. Zubik, 295 F.2d 53, 58 (3 Cir. 1961); *United States v. Bethlehem Steel Corp.*, below, 319 F.2d, 520.

3. The 1946 regulation was not contemporaneous with the 1899 act, and did not follow preceding construction and court decisions.

Section 209.410 of 33 C.F.R. quoted by petitioner, pp. 49, 50, is an anomoly.

Before dealing with it, however, we should point out that the informal 1901 letter, pet., p. 52, is clearly extraneous. There is nothing to indicate whether the wreck of the CASCADE was abandoned, and whether or not it obstructed a public channel. The legal advice was gratuitous at best.

In 1905 the Judge-Advocate General informed the Secretary of War that an owner had the right to abandon a wreck in a public channel without regard to any question of negligence. Subject: Wreck—SS LOUISIANA of the Southern Pacific Company, C. 18, 824, November 14, 1905.

5. Full text is set out in Appendix F

This latter opinion was confirmed by *United States v. Bridgeport Towing Line, Inc.*, 15 F.2d 240 (D. Conn.) in 1926.

In 1931 the House Committee on Rivers and Harbors considered a bill to amend the Rivers and Harbors Act of 1899. Among many other things the amendment would have made it unlawful to abandon any wreck which might in whole or in part float into and upon navigable waters of the United States. The War Department opposed the amendments, with one exception not relevant here. The Hon. Patrick J. Hurley, Secretary of War, wrote to the Chairman of the Committee:

> "The present law is comprehensive and has proven reasonably effective, both as a preventive and remedial measure. During the long period it has been in existence its provisions have been the subject of judicial interpretation and decision, and the public has become acquainted with its requirements and meaning. * * * If legislation creating new offenses or correcting of the abuses is needed to supplement the existing law it should preferably take the form of a separate and independent measure."

Report of Hearings before the House Committee on Rivers and Harbors, 71st Congress, 3d Sess., on H.R. 11512 (1931).

At this point the pertinent reported decisions were *United States v. Bridgeport Towing Line, Inc.*, above-mentioned, and *Loud v. United States*, 286 Fed. 56 (6 Cir. 1923), both confirming that shipowners had a right to abandon wrecks, whether they had been negligent or not, and that the former

6 Full text of letter is set out as Appendix E.

owners had no personal liability to the government for the cost of wreck removal.

The MANHATTAN, 10 F.Supp. 45, affirmed, 85 F.2d 427, cert. denied, 300 U.S. 654, confirmed that interpretation again, in 1936.

Judge Madden correctly stated:

> "The last sentence of the regulation would neatly solve our problem. But what it said was contrary to judicial decisions at the time the regulation was issued [1946], and was, if we are correct in our estimate of what the statutes mean, an unauthorized effort to administratively improve the statute."

United States v. Bethlehem Steel Corp., below, 319 F.2d, 520. We find no instance where this regulation has been enforced or even acknowledged by any court.[7]

4. Other contentions by petitioner are ill-founded

a. Petitioner states that respondents do not deny that their negligence caused the wreck, and that they violated a criminal statute, 33 USC § 409. (Pet., p. 6) We emphatically deny both statements. We are obliged to assume the truth of petitioner's allegations for the purposes of this proceeding.

b. Petitioner suggests that this court invent some Federal common law to supplement the present statutes. (Pet., pp. 13, 14)

As we understand it, common law derives from judicial decisions and customs. John Chipman

7. Even Army pamphlet 27-164, Appendix C, makes no mention of this anamolous regulation

Gray, *The Nature and Sources of the Law*, Chs. IX, XII (Beacon Press Ed., Boston, 1963, pp. 198 et seq., 282 et seq.) So far as judicial decisions are concerned, this Court has on at least three occasions ruled that there is no Federal common law prohibiting obstructions to navigable waters. It is for Congress to determine appropriate regulations and sanctions. *Gilman v. Philadelphia*, 3 Wall. 713, 724, 725 (1866); *Willamette Iron Bridge Co. v. Hatch*, 125 US 1, 8 (1888); *United States v Republic Steel Corp.*, 362 US 482, 486 (1960).

So far as custom goes, the decisions are unanimous: men who suffer the wreck of their ships in public waters have always been entitled to abandon them. *Winpenny v. Philadelphia*, 65 Pa. 135, 138, 139 (1870); *Petition of Highlands Navigation Corporation*, 29 F.2d 37, 38 (2 Cir. 1928).

> "The right of the Crown to remove the obstruction [five hulks in the waters of Halifax Harbor] and charge the owner with the cost is a remedy not existing at common law, and means are provided in the statute to recover the expense, such means being a special and particular remedy."

Attorney-General of Canada v. Brister, [1943] 3 D.L.R. 50, 17 Mar. L.R. 93, 106 (Nova Scotia).

> "The respondents were under no liability to pay these expenses [of wreck removal] at common law. The liability, if it exists, is created by the enactment I have quoted [Aire and Calder Navigation Act, 1889, s.47]."

Barraclough v. Brown, 8 Asp. Mar. Cas. (NS) 290, 291 (HL, 1897, Lord Herschell).

c. Next, cutting off in another direction, petitioner argues that the respondent Bethlehem's right to abandon the wreck of the TEXMAR derives solely from statute—the Limitation of Vessel Owner's Liability Act, 46 USC §§ 181 et seq. (Pet., p. 11)

On its face this Act applies to whole ships and wrecked ships alike. The "abandoning the ship and freight" mentioned in *The SCOTLAND*, 105 US 24, 28 (1881), means the surrender described in General Admiralty Rule 51. It is a foreshortened expression of the term used in Europe, "abandoning the ship and freight to the creditors," as the maximum liability of the shipowner. *Walker v. Boston and Hope Insurance Companies*, 80 Mass. 288, 297 (1859).

Here we are concerned with abandonment of personal property. *Brown on Personal Property*, Sec. 6, pp. 9, 10; *Thompson v. United States*, 62 Ct.Cl. 516, 524, 525 (1926).

The wreck having sunk or stranded on the shore within Grays Harbor County, we are dealing with common law, not maritime law. William Palmer, *The Law of Wreck* (London, 1843), p. 2.

d. Confusing the issue at hand with the right to limitation of liability, petitioner blandly asserts that only "innocent" owners may abandon wrecks and thereby absolve themselves of liability. (Pet., p. 12). Liability to whom?

Not a single case cited by petitioner holds or intimates that the sovereign—the United States government or a state or the Queen of England—is entitled to recover from a former owner the cost of

removing a wreck accidentally lost in public waters. The rights of other vessels, dock owners, and proprietors of British conservancies and canals are measured by tort law, which is not involved in this case.

e. Throughout its argument petitioner equates this wreck with trespass or nuisance, and reasons therefrom that the Government has an extra—statutory cause of action to recover damages or restitution.

There was no trespass. The State of Washington owns the bed of Grays Harbor. State Constitution, Art. 17 Sec. 1, vol. O, RCW p. 80; *Port of Seattle v. Oregon & Washington R. Co.*, 255 US 56, 63 (1921); Submerged Lands Act, 67 Stat. 30, 43 USC Sec. 1311.

A wrecked ship has never been considered a purpresture or an indictable nuisance. See authorities quoted and cited in *Winpenny v. Philadelphia*, 65 Pa. 135, 138, 139 (1870).

The government removes or destroys a wreck when and as it sees fit to carry out its governmental function to make navigation safe, not to perform some private shipowner's duty. *Baltimore, Crisfield & Onancock Line v. United States*, 140 F.2d 230, 233 (4 Cir. 1944). The expense does no benefit to the man who has already lost his ship. Hence the government has no claim to restitution from him. *Loud v. United States*, 286 Fed. 56, 59 (6 Cir. 1923). Petitioner's citation from the *Restatement of Restitution* is inappropos.

f. Petitioner argues that wreck removal is a burden on the public purse. (Pet., p. 15) It cites a pending case, *United States v. 2,220,000 Pounds*

Chlorine Cargo ex Barge Wychem, et al., as a vivid example.

In its brief in that case, the government says that the barge was no obstruction to navigation. The cargo was removed pursuant to the Federal Disaster Act, P. L. 81-875, 64 Stat. 1109 (1950). We fail to see its relevance here.

If indeed wreck removal has become a burden which Congress feels should be shifted to private shipping, as in England, Congress is free to change the rules at any time. But this Court ought not to change the rules to accommodate the Executive's ideas of what fiscal policy should be. *United States v. Standard Oil Co.*, 332 US 301 (1947), is precisely in point:

> "It (the tort law analogy) is advanced rather as the instrument for determining and establishing the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities.
>
> "Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours." 332 U.S., 314.

5. Added Ground in Support of Decree

In both courts below we pointed out the peculiar attitude taken by the government when this accident occurred.

Two weeks after the accident the District Engineer simultaneously declared the wreck to be an

obstruction to navigation within the meaning of both Sections 414 and 415 of Title 33, U. S. Code, announced that he was taking action to remove or destroy it as provided by said statutes, and denied Bethlehem the right to abandon it. (Telegram, R. 28)

The District Engineer cannot proceed under both sections at once—they are alternative. Since Bethlehem had already abandoned the wreck, the engineer no doubt had his choice. But we have maintained, and do here maintain, that this cannot be a frivolous choice. If he determined as a fact that the wreck created an emergency requiring summary seizure under Section 415, as stated in his telegram, then the District Engineer proceeded under Section 415, not Section 414. The government's rights in this case are measured by the terms of Section 415, and any question of abandonment is moot.

CONCLUSION

Courts of appeals have agreed in their interpretation of the Wreck Statute over a span of forty years. As long ago as 1931 the Secretary of War concluded that its meaning was settled, and that it had proven reasonably effective, both as a preventive and remedial measure. Historically, wrecks and volitional obstructions have been treated as distinctly different subjects, both by Congress and by the courts; there is no genuine connection between the problem dealt with in *United States* v. *Republic Steel* and the problem dealt with in *United States* v. *Zubik* and in this case.

For these reasons we respectfully submit that the petition should be denied.

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November 1963

APPENDIX A

Federal Decisions on Right of Abandonment and Expenses for Wreck Removal

Since 1899 there have been six major decisions by federal courts bearing on the right of abandonment and the question of indemnity to the government for expenses of wreck removal. We cite them in chronological order.

In *LOUD v. UNITED STATES* (6 Cir. 1928) 286 Fed. 56, a power barge collided with an abutment and sank in St. Mary's River. The District Engineer straightened the sunken vessel to clear the channel from this obstruction, upon authority of § 415. The United States claimed for its expenses. The court of appeals rejected the claim.

> "It is equally clear that the owner of a vessel is not personally liable for the expense incurred by the government in removing obstructions to navigation under authority of this section, but, on the contrary, that the claim for such expenses must be asserted directly against the vessel and its cargo. The further claim of the United States government that . . . this money was expended for the use and benefit of the owners . . . is negatived by the uncontradicted evidence that this vessel was a total loss . . ." 286 Fed., 59.

In *UNITED STATES v. BRIDGEPORT TOWING LINE, INC.* (D. Conn. 1926), 15 F.2d 240, defendant was trying to salvage an abandoned barge. By defendant's negligence the barge sank and became an obstruction to navigation. The government sued

to compel defendant to remove it. The court denied an injunction.

> "(The Rivers and Harbors Act, §§ 403, 406) is not applicable to a case of accident or negligence. In other words, when the statute speaks of the 'creation of any obstruction,' what is meant is evidently the consciously directed action to such an end. . . .
>
> ". . . The differentiating circumstance (between *United States v. Hall* (1 Cir. 1894) 63 Fed. 472, and the present case) lies in the fact that the *sinking* of the vessel was not deliberate, was not intended, but was due to an accident which, whether caused by negligence or not, remains nevertheless an accident." 15 F.2d 241.

In *THE MANHATTAN* (*United States v. Atlantic Refining Co.*, E.D. Pa. 1935) 10 F.Supp. 45, respondent's ship BESSEMER collided with the government's dredge MANHATTAN, which sank in the Delaware River. The government raised the dredge and claimed the cost of raising as part of its collision damages. The court rejected that item as an element of collision damages.

> "I fully agree with the Commissioner's conclusion that this is not an item which can be added to the government's recoverable damages. In the absence of any statute and before the enactment of the Wreck Statute, the owner of a sunken vessel always had the right to abandon her and thus entirely absolve himself from liability for damages caused by the obstruction of the channel. See *Winpenny and Chedester v. Philadelphia*, 65 Pa. 135. The theory of the law was that

if the sunken vessel is a menance to navigation its disposition is a matter of public concern, and that the owner has suffered sufficient loss in the loss of the craft and no further loss will be imposed upon him by way of damages for subsequent accident, provided always that he has abandoned it. *Gulf Coast Transp. Co. v. Ruddock-Orleans Cypress Company* (D.C.) 17 F.2d 858. It follows that since the removal could not have been required of the owner, its cost in no way increased his loss and consequently could not have been charged by him to the wrongdoer.

"The Wreck Statute, U.S.C. tit. 33, §§ 409, 414, 415 (33 USCA §§ 409, 414, 415), did not materially change the law in this respect. Section 415 [409] reaffirms the duty to mark the wreck. It applies to the government as well as private owners. The SNUG HARBOR (*Eastern Transp. Co. v. United States*) 283 Fed. 1015 (D.C.). But we have nothing to do with that section in this case. Section 414 merely reaffirms the law as it stood by which the owner terminates his liability by abandonment (which may consist in doing nothing for thirty days) and the Secretary of War is authorized (but not required) to assume the general governmental duty of clearing the navigable channel. Section 415 provides that he may perform this duty without waiting for abandonment by the owner. The only possible change effected by these statutes is that the government is given either the wreck itself (in case of removal after abandonment) or a lien against it for the amount expended (in case of immediate removal before abandonment).

"Although I think it clear that sections 414 and 415 of the statute were not intended to apply to governmental vessels sunk in

navigable channels, the question is of no moment, because whatever cost falls upon the government in removing any vessel occurs by reason of its general powers, and functions and not by reason of its ownership of the wreck. The burden upon the government is exactly the same whether the vessel sunk is government owned or privately owned, or whether it was sunk by wrongful act or by pure accident.

"So far as I know the right of recoupment against a tort-feasor who causes a sinking has never been asserted by the government in case the wreck was privately owned, and I can find nothing in the statute which creates such a right either in the case of privately owned vessels or of those which are the property of the government. In fact, the rights *in rem* which are conferred would seem to negative that intent. At any rate the statute is silent upon the subject." 10 F.Supp., 49, 50, expressly approved on appeal, 3 Cir. 1936, 85 F.2d 427, 429, cert. denied sub nom. *United States v. THE BESSEMER*, 300 U.S. 654.

In *ZUBIK v. UNITED STATES* (3 Cir. 1951) 190 F.2d 278, libelant bought a sunken wreck. Thereafter the district engineer raised it. Zubik offered to pay the government's expenses in return for the wreck. The district engineer refused, and Zubik sued to recover it. The court dismissed his libel.

"(Section 414) expressly gives (the Secretary of the Army) the discretion to sell the barge and in such case all the proceeds must go into the Treasury. The courts cannot interfere with this discretion given him. It is immaterial that as a matter of hindsight it appears that the government stands to gain

rather than lose by the deal. If the costs of removal exceeded the value of the barge the owner would not be liable for the difference. He cannot conversely, claim the benefits simply because the salvage operations proved financially successful." 190 F.2d, 281.

In *UNITED STATES v. WILSON* (2 Cir. 1956) 235 F.2d 251, the government sued to compel the defendants to remove a sunken barge from the Hudson River. There was evidence that the barge had been deliberately scuttled, but no finding that it was done at the owner's behest or with his knowledge. The court denied an injunction.

> "Clearly, our sunken barge is not a structure prohibited by (§§ 401 and 404) which were concerned with bridges, dams, piers, wharves, etc. Nor, we hold, was it a 'structure' as denounced in (§ 403). . . . Under (§ 409) it is the duty of the owner of a sunken craft to commence the immediate removal thereof. But failure to remove is 'considered as an abandonment' thereof which is grounds for removal *by the United States* as provided for by (§ 414). And (§ 414) confers powers on the Secretary of War to remove the craft with provision (not to charge the cost of removal to the owner) to forfeit the craft to the contractor employed to accomplish the removal.
>
> "Thus we find nothing in the 1899 Act which justifies an injunction whereby the cost of removal may be saddled upon any of these defendants." 235 F.2d, 253.

Finally, in *UNITED STATES v. ZUBIK* (3 Cir. 1961) 295 F.2d 53, defendant negligently sank two towboats in the Allegheny River, in such manner as to obstruct navigation. The government demanded

that he remove them. He did not, and the district engineer then removed the wreckage and brought action against him alleging that the wreckage was valueless and that the costs of removal went to the unjust enrichment of the defendant.

The government relied upon *United States v. Republic Steel Corp.* (1960) 362 U.S. 482, as "teaching" that the courts must formulate remedies appropriate to effective enforcement of the Rivers and Harbors Act, 1899, and that such remedies are to be fashioned even though they rest on inferences. 295 F.2d, 54.

The court of appeals carefully considered that decision, and found it entirely unrelated to the problem at hand. 58. The court also reviewed the Act itself, and concluded:

> "The sum total of the statutory scheme, excepting its criminal penalty provisions, evidences that the forfeiture right accorded to the Government to remove wrecks obstructing navigable waters is in the nature of an *in rem* right against the removed vessel and not an *in personam* right against the vessel's owner. 295 F.2d, 57.

Lastly, the court of appeals for the 3rd circuit noted that the government's contentions were plainly an effort to achieve judicial legislation.

> "It is the province of Congress and not that of the courts to legislate and where Congress has legislated in a particular field explicitly and with definiteness as it has in the Rivers and Harbors Act for the courts to expand the periphery of the legislative scheme would be judicial trespass." 295 F.2d, 58.

APPENDIX B

COMPARATIVE WRECK STATUTES

English Statutes

British harbors, rivers, and canals are put in the care of local commissioners, undertakers, companies, and the like, each by separate local act. Examples of a few of these acts, concerning wreck removal, are as follows

Dublin Port and Docks Act, 32 & 33 Vict. Chap c. Sec. 96:

> "... the harbourmaster or dockmaster may remove any wreck or other obstruction to the harbour, quays, docks or other approaches to the same; and also any floating timber which impedes the navigation thereof; and **the expense of removing any such wreck**, obstruction or floating timber, **shall be repaid by the owner of the same**, and the harbor-master or dockmaster may detain such wreck, obstruction or floating timber, for securing the expenses" etc.

Manchester Ship Canal Act, 1936, sec. 32

> "(1) Whenever any vessel is sunk, stranded or abandoned in part of — (a) any river canal waterway navigable channel lock or dock forming part of the harbour and port of Manchester or of the undertaking ... the company may if they think fit cause the vessel to be raised or removed ...
>
> "(2) **The company may recover from the owner** of any such vessel **all expenses** incurred by the company under this section in connec-

tion with that vessel . . . as a debt in any court of competent jurisdiction. . . .

"(6) In this connection the word 'owner' in relation to any vessel sunk stranded or abandoned as aforesaid means the owner of that vessel at the time of the sinking standing or abandonment thereof."
(copied from The STONEDALE NO. 1, [1954] 2 All E.R. 170, 173)

These local acts are by no means identical, one to another. *Sheppey Glue & Chemical Works, Ltd. v. Conservators of the River Medway*, 25 Ll. L. Rep. 32, 33.

However, there is a general statute of which these local bodies may take advantage

Harbours, Docks, and Piers Clauses Act, 1847, 10 & 11 Vict. c. 27, s. 56:

"The harbour-master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and **the expense of removing any such wreck**, obstruction, floating timber **shall be repaid by the owner** of the same," etc.

State Statutes

Code of Virginia, sec. 2011, as amended by Acts 1889-90, c. 371, p. 624:

"They (the board of harbor commissioners) shall have the authority to cause the removal of any wharf, dock, wreck, or other obstruction to navigation, . . . **at the expense of the owner** or party causing the obstruction: . . ."

Compare the Laws of Massachusetts, 1883, c. 260, confining *in personam* liability to willful or malicious sinkings.

City Ordinance

Ordinances of the City of New York, art. 8, c. 8, s. 120:

> "In case . . . a vessel shall be stranded, sunken or wrecked and be abandoned for 10 days, the commissioner shall notify the owner . . . and if the owner is not known to the commissioner, or is not within the city, or shall fail to comply with the notice, the commissioner shall cause such obstruction or vessel to be removed, and **the expense of such removal shall be recoverable** by action **from the owner** and shall be a lien on the property or vessel so removed until paid. . . ."
>
> (Copied from *Petition of Highlands Nav. Corporation*, 29 F.2d, 38).

APPENDIX C

Department of the Army pamphlet 27-164, *Military Reservations and Navigable Waters* (July 1961), pp. 181, 182:

"99. REMOVAL OF SUNKEN VESSELS. The Secretary of the Army is authorized, in his discretion, to remove any sunken vessel or similar obstruction that is obstructing or endangering the navigation of any of the navigable waters of the United States. This removal may be ordered either upon abandonment of the vessel by its owners or upon the expiration of more than thirty days, whichever occurs sooner. The removal may be accomplished without liability to the owners of the sunken craft.[42]

"In emergency situations, the Secretary of the Army may order the summary removal of sunken or grounded vessels obstructing the navigation of navigable waters of the United States. The costs of such removals create a lien against the vessel. The vessel may be sold to satisfy the lien if the owners fail or refuse to reimburse the United States for the cost of removal within thirty days after notice.[43]

"These provisions do not invest the Secretary of the Army with exclusive jurisdiction over the removal of obstructions in the navigable waters of the United States. They do, however, clothe him with the discretionary power either to act or to leave the matter in the hands of local authorities. When the

42 Rivers and Harbors Appropriation Act of 1899, sec. 19, 30 Stat. 1151, 33 U.S.C. 414 (1958).

43 Rivers and Harbors Appropriation Act of 1899, sec. 20, 30 Stat. 1151, 33 U.S.C. 415 (1958).

Secretary exercises his discretion and takes charge of a sunken vessel, his jurisdiction is exclusive."

"The owners if a sunken vessel, of course, have the primary right to remove it. Once abandonment has been established, however, the United States may apply such value as the sunken vessel may have to the payment of the cost of removal. In removing an abandoned sunken vessel from the navigable waters of the United States, the United States is limited in its recovery to the value of the vessel and its cargo. A claim for further reimbursement against the owners may not be made.""

44 Hagan v. City of Richmond, 104 Va. 728, 52 S.E. 385 (1905).

45 Dig. Ops. JAG 1912, p. 778.

46 JAG 159.17 November 1933

APPENDIX D

Early Federal Statutes Mentioned

An act to improve the navigation of the Ohio and Mississippi rivers, 4 Stat. 32 (1824), was the beginning step. Two days later Congress appropriated money to deepen the channel leading into the harbor of Presque Isle and to repair Plymouth Beach, 4 Stat. 38 (1824).

In 1826 $50,000 was appropriated to remove obstructions in the river Savannah, below the city of Savannah, 4 Stat. 173.

Other similar appropriations followed at each session of Congress. The Rivers and Harbors appropriation Act of July 4, 1836, 5 Stat. 129, made the first express provision for a wreck:

> "For removing the wreck in the harbor of New Bedford, ten thousand dollars."

The appropriation act of July 25, 1868, 15 Stat. 174, supplied $100,000 to be expended under the direction of the Secretary of War in the removal of the wreck of the iron steamship "Scotland", then on the bar outside of Sandy Hook.

The Rivers and Harbors Act of 1872, 17 Stat. 373, furnished money to remove wrecks in the Chifuncte river, Louisiana, and in Stono river, South Carolina.

An act directing the removal of obstructions from the harbor of the Delaware breakwater, 1880, 21 Stat. 61, appears to be the last such specific appropriation:

> "That the Secretary of War be, and he is hereby, directed to cause to be removed from

the harbor at the Delaware Breakwater and the entrance thereto and in the main ship channel of the Delaware Bay and River several vessels which were sunk in the year eighteen hundred and seventy-seven, and now forming obstructions endangering the safety of vessels entering said harbor after reasonable notice to the owners of such vessels to remove the same, and the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated for that purpose out of any money in the Treasury not otherwise appropriated."

APPENDIX E

From Report of Hearings before the House Committee on Rivers and Harbors, 71st Congress, 3rd Sess., on H.R. 11512, p. 24

WAR DEPARTMENT
Washington, February 12, 1931.

HON. S. WALLACE DEMPSEY,
Chairman Committee on Rivers and Harbors,
House of Representatives, Washington, D.C.

Dear Mr. Dempsey: Reference is made to your letter of January 31, 1931, inclosing a copy of bill H.R. 11512, with request for the views of this department as to the advisability of enacting all or any of its provisions.

The purpose of the bill is to amend the provisions of the Rivers and Harbors Act of March 3, 1899, relating to the protection of navigable waters. It is proposed:

1. To reduce the minimum penalty prescribed by the act for violation of its provisions from $500 to $250.

2. To change the phraseology and enlarge the scope of certain sections of the act.

The act of 1899 makes violations of its provisions a misdemeanor punishable by a fine of not exceeding $2,500 nor less than $500. To properly protect navigable waters from obstructions it is often necessary to institute prosecutions for minor infractions of the law. In such cases experience has shown that juries are reluctant to convict as they feel that

the statutory penalty is out of proportion to the gravity of the offense. It is not improbable that a lesser penalty would conduce to a more effective enforcement of the law. No objection is seen, therefore, to the enactment of the proposed amendment reducing the minimum penalty from $500 to $250.

The department, however, is not prepared to sanction the other amendments proposed in the bill. The present law is comprehensive and has proven reasonably effective, both as a preventive and remedial measure. During the long period it has been in existence its provisions have been the subject of judicial interpretation and decision, and the public has become acquainted with its requirements and meaning. Amendments to a statute of long standing, established validity and settled interpretation, changing its phraseology and enlarging its scope to include things of doubtful pertinency, may lead to confusion and impair the force of the statute. They should not be adopted until the fullest investigation has demonstrated their desirability. If legislation creating new offenses or correcting of the abuses is needed to supplement the existing law it should preferably take the form of a separate and independent measure.

After careful consideration of the statements of the proponents and advocates of the proposed amendments, this department is not convinced that it would be wise or expedient to enact any of the provisions of the bill except those relating to reduction of penalty.

Sincerely yours,

PATRICK J. HURLEY
Secretary of War

APPENDIX F

Opinion of Judge-Advocate General Concerning Wreck of the S. S. "Louisiana."

(18824) C.

WAR DEPARTMENT,
Office of the Judge-Advocate General
Washington

November 14, 1905

To the
Secretary of War.

Sir:

These papers relate to the wreck of the S. S. "Louisiana," owned by the Southern Pacific Railroad Co., which sank at the wharves of that company at New Orleans, Louisiana, and slid out some distance into the stream where it stuck, so that, in its present position, it is alleged to be a menace to navigation.

It appears that both the railway company and the insurer of the vessel have abandoned the wreck as a total loss; and application is made by the railway company for the removal of the same under the Act of March 3, 1899 (30 Stats. 1154). There is submitted with the application a copy of an instrument by which the Southern Pacific Company "for itself as well as on behalf of its underwriters, to whom any interest in the same have passed," states that it "formally abandons to the United States the wreck of said steamer, and consents that the United States Engineers remove the same from where she now lies, under the procedure taken by the United States in similar cases."

In passing it may be noted that while the con-

pany thus formally abandons the vessel to the United States for removal, under the statute which would give the Government the property therein, it appears from these papers that neither the company nor the underwriters would relinquish their claim to the vessel to a private firm—(the Jahncke Navigation and Improvement Company) which offered to remove the wreck without compensation other than that it should become the property of the firm.

It is claimed by the railway company that the wreck is a menace to navigation so that it becomes the duty of the Secretary of War to have it removed; while the local engineer officer (Captain J. F. McIndoe), in accompanying report dated October 31, 1905, says:

> "The Superintendent of the Board of Commissioners of the Port of New Orleans states that no river steamboats are permitted to land in that vicinity below Conti Street (see blue print, accompanying my report of June 1, 1905), a distance of over a quarter of a mile along the wharf front from the foremast of the wreck.
>
> "Considering the width and great depth of the river and the general configuration of the wharf line between Canal and St. Ann Streets, it is reasonable to believe that a steamboat can be handled without danger of colliding with the wreck, which lies over a quarter of a mile below the landing and so near the wharf line. As a matter of fact steamboats making or departing from the landing referred to would habitually be near the middle of the river when opposite the position of the wreck, even if the wreck were not there. There are many places in the Mississippi River where steamboats in leav-

ing landings have a much shorter distance to get straightened out in, in order to avoid bars and snags, and where the current is stronger than in New Orleans Harbor.

"The only accident due to the wreck is that of the steamboat J. E. TRUDEAU which occurred April 10, 1905, three days after the sinking of the 'Louisiana.'

Examination of the document 'Protest Extended' develops the fact that this boat had successfully left her landing and was proceeding up the river when she became unmanageable and was carried by wind and current against the wreck and damaged. This does not prove that the wreck is a menace to navigation for had the 'Trudeau' not struck the 'Louisiana,' she would probably have struck the wharf and might have been more seriously damaged or even sunk.

"Relative to the statements in Memorandum as to 'striking an old wreck' and as to the 'Louisiana' being 'directly in the fairway of the river,' I would respectfully invite reference to my report dated June 1, 1905.

"Nothing has developed to cause me to alter the opinion expressed in my reports of April 20, April 22, May 3 and June 1, 1905, viz: that the wreck of the 'Louisiana' does not obstruct or endanger the general navigation of the Mississippi River and that it is a menace only to vessels arriving at and departing from the Southern Pacific wharves at St. Ann street and adjacent wharves. It is my fixed opinion that this wreck can not be considered such an obstruction as is contemplated by the law for removal of wrecks by the United States. It is an obstruction to the wharves of the Southern Pacific Co. and all work in connection with its removal

should be done without any expense to the United States."

These views are concurred in by Colonel Sears, the Division Engineer, and by the Chief of Engineers, U. S. Army, who expresses the opinion that the wreck is not one which it is the duty of the Department to remove; but that "as it is chiefly an obstruction to the approach to the wharves of the Southern Pacific Company, it would seem that, if its removal is required at all, the expense thereof should be borne by the said company."

Under these facts the opinion of this office is desired: first, as to whose duty it is to clear this waterway; and, second, whether we can hold the railway company or the underwriters for the same, or whether the Government will have to do it.

In regard to the first question, it is to be observed that in the opinion of the Engineer Department the wreck is not a menace to general navigation for the reasons stated above; but is an obstruction to the approach to the wharves of the railway company that owned the vessel; and further that the position of the wreck appears to be such that it does not even preclude access to the wharves of the railway company, although it requires greater care in the use of the same. I concur in the views of the Chief of Engineers that if is not incumbent upon the War Department to cause every sunken vessel to be removed; but that the wreck must be in some navigable channel where it would, to use the language of the statute, "stop, seriously interfere with, or specially endanger navigation." The determination of this matter is committed by the statute to the "Secretary of War, or any agent of the United States to whom the Secretary may delegate proper

authority." It follows, therefore, that if the Secretary of War, in the light of the views expressed by the Engineer Department, should be of opinion that the wreck is not such a menace to navigation as the statute contemplates, he is under no duty to take any steps regarding its removal.

The second question is as to whether the railway company or the underwriter can be required to remove the wreck; in other words, whether either party is under a legal duty which can be enforced by or at the instance of the War Department. In my opinion the statute does not impose such a duty upon the owner or underwriter of the vessel. So long as the vessel is not abandoned, it makes it the duty of the owner to use due precaution to mark its location, to prevent it being a menace to navigation; but it recognizes the right to abandon the wreck without further liability on account of the same. In the event of such abandonment the wreck, if such a menace to navigation as the statute contemplates, should be removed under the provisions of the statute.

Under the facts, as they appear from these papers, I am of opinion that the Secretary of War may properly determine that the wreck is not such a on as it is incumbent upon the Department to remove under the statute in question; so that, if its removal is required in the interest of the applicant, the expense thereof should be borne by it.

Very respectfully,

GEO. B. DAVIS,

Judge-Advocate General.

Nov. 15, 1905